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Washington, D.C. 20530

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# Attorney General's Commission on Pornography

## Final Report

*July 1986*

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# PART ONE

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## Chapter 1

## Commissioner Biographies

Henry E. Hudson served as chairman of the Attorney General's Commission on Pornography. Henry Hudson was born in Washington, D.C. He was awarded a bachelor of arts degree from American University, School of International Service, Washington, D.C., in 1969. In 1974 Mr. Hudson received his juris doctor from American University, Washington, D.C.

Mr. Hudson is currently serving his second term as Commonwealth Attorney in Arlington County, Virginia. Mr. Hudson recently has been appointed to serve as the United States Attorney for the Eastern District of Virginia. Prior to his election, Mr. Hudson was the Assistant United States Attorney for the Eastern District of Virginia, Criminal Division in Alexandria. Mr. Hudson has also served as the Assistant Commonwealth Attorney in Arlington County, Deputy Clerk of the Circuit Court of Arlington County and Deputy Sheriff.

Chairman Hudson enjoys membership in several professional organizations including the Virginia State Bar, Virginia Commonwealth Attorneys Association, Criminal Law Section of the Virginia State Bar, Virginia Trial Lawyer Association, Arlington County Bar Association, and the National District Attorneys Association. In addition, Mr. Hudson has made significant contributions through his work with various community service organizations including the Arlington County Volunteer Fire Department, the Arlington County Police Trial Board, the American

Red Cross, and the Task Force on Substance Abuse and Youth.

In 1981, President Reagan appointed Mr. Hudson to the National Highway Safety Advisory Committee. Mr. Hudson enjoys membership on the Congressional Award Council for the Tenth Congressional District.

Judith Veronica Becker received a bachelor of arts degree in Psychology from Gonzaza University in Spokane, Washington, in 1966. She was awarded a masters of science degree in Clinical Psychology from Eastern Washington State College, Cheney, Washington, in 1968. Dr. Becker received her Ph.D. from University of Southern Mississippi, Hattiesburg, Mississippi, in Clinical Psychology in 1975. Dr. Becker completed her internship at the University of Mississippi Medical School in 1974. Dr. Becker is currently licensed to practice in New York, New Jersey and Tennessee.

Dr. Becker is an Associate Professor of Clinical Psychology in Psychiatry at Columbia University, College of Physicians and Surgeons. She is also the director of the Sexual Behavior Clinic at the New York State Psychiatric Institute. Previously, Dr. Becker has served as Assistant Professor at the University of Tennessee Medical School, an Instructor in Psychiatry and Human Behavior at the University of Mississippi Medical School, and Intern at the University of Mississippi Medical Center.

Dr. Becker's major research interests are in the field of sexual aggression, rape victimization, human sexuality and behavior therapy. She has researched and written numerous papers. Presentations of her research have included those before the Association for the Advancement of Behavior Therapy, the annual meeting of the Southern Psychological Association, the annual meeting of the Southeastern Psychological Association, the International Academy of Sex Research and the Society for Sex Therapy and Research.

Diane D. Cusack has recently completed her second term on the Scottsdale City Council. Mrs. Cusack came to Scottsdale in 1957 and since that time has been very active in community affairs.

Mrs. Cusack's involvement with Scottsdale began in 1964 and led to service on the Planning and Zoning Commission for thirteen years, five as Chairman. Mrs. Cusack has participated as a speaker and panelist at numerous meetings of the Arizona Planning Association, and is recognized statewide for her expertise in the planning field.

Presently, Mrs. Cusack is serving her seventh term as President of the Maricopa County Board of Health. Long active in the health field, she is also Chairman of the City's Emergency Medical Services Committee and in the past has served as a member of the Board of the local Hospital.

After receiving a bachelor of arts degree in economics from Rosary College, Mrs. Cusack became one of the first women to attend the Harvard Business School, receiving a Special Certificate in 1954. A market research analyst, Mrs. Cusack has devoted herself to community affairs since residing in Scottsdale.

While raising her family, Mrs. Cusack was active in scouting. She initiated and managed a school library, and served as a Red Cross School Nurses' Assistant at Tonalea School. She also was president of the Scottsdale League of Women Voters and President of the Scottsdale Symphony Guild, and is a member of the Arizona Academy.

Mrs. Cusack and her husband, Joseph, a Senior Engineer with Motorola, have three grown children and remain active members of their church and community.

Park Elliott Dietz received an A.B. from Cornell University with honors in Psychology and Distinction in All Subjects in 1970. He earned degrees in medicine (M.D.), public health (M.P.H.), and sociology (Ph.D.) from the Johns Hopkins University. While a Robert Wood Johnson Foundation Clinical Scholar, he served psychiatric residencies at the Johns Hopkins Hospital and the Hospital of the University of Pennsylvania, where he was Chief Fellow in Forensic Psychiatry. He is board certified in psychiatry by the American Board of Psychiatry and Neurology. As an Assistant Professor of Psychiatry at the Harvard Medical School he served as Director of Forensic Psychiatry at the maximum security hospital at Bridgewater operated by the Massachusetts Department of Correction.

Dr. Dietz is Professor of Law, of Behavioral Medicine and Psychiatry and Medical Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia in Charlottesville. At the University of Virginia, he teaches courses in Law and Psychiatry, Psychiatry and Criminal Law, and Crimes of Violence, provides training in forensic psychiatry, conducts research on sexual offenses, violence, and threats and directs the Forensic Psychiatry Clinic, which conducts evaluations on behalf of attorneys and courts in criminal and civil cases. He also serves as a Lecturer in the Department of Health Policy and Management at the Johns Hopkins School of Hygiene and Public Health, as a psychiatric consultant to the Behavioral Science Unit, Federal Bureau of Investigation Academy, Quantico, Virginia, and as a consultant to attorneys, courts and public agencies throughout the United States.

Dr. Dietz is a member of Phi Beta Kappa, Phi Kappa Phi, Alpha Epsilon Delta, and Alpha Omega Alpha honor societies. He was the recipient of the 1975 John P. Rattigan Award of the American Society of Law and Medicine, the 1977 Wendell Muncie Award of the Maryland Psychiatric Society and Maryland Association of Private Practicing Psychiatrists, and the 1986 Psychiatry Section Krafft-Ebing Award of the American Academy of Forensic Sciences.

Dr. Dietz has served on the editorial boards of the Johns Hopkins Medical Journal, the Bulletin of the American Academy of Psychiatry and the Law, the Psychiatric Journal of the University of Ottawa, the Journal of Forensic Sciences, and Behavioral Sciences and the Law. He has served as Chairman of the Psychiatry Section of the American Academy of Forensic Sciences; Vice President of the American Academy of Psychiatry and the Law; Vice President of the Board of Trustees of the Forensic Sciences Foundation; a member of the Committee on Federal Trauma Research of the National Research Council and National Academy of Sciences; Chairman of the Committee on Abuse and Misuse of Psychiatry and Psychiatrists in the United States and a member of the Advisory Committee on the Paraphilias, Task Force on Nomenclature and Statistics (DSM-III-R), of the American Psychiatric Association; and a member of the Committee on Psychiatry and Law of the Group for the Advancement of

Psychiatry. He is also a member of the American Society of Criminology, the American Society of Law and Medicine, the Forensic Science Society (Great Britain), and the Society for the Study of Social Problems.

Dr. Dietz's writings have appeared in the *American Journal of Public Health*, the *Archives of General Psychiatry*, the *Bulletin of the American Academy of Psychiatry and the Law*, *Behavioral Sciences and Law*, the *International Journal of Psychiatry and Law*, the *Journal of the American Medical Association*, the *Journal of Forensic Sciences*, the *Journal of Police Science and Administration*, the *Journal of Public Health Policy, Medicine and Law, Pharmacology*, *Biochemistry and Behavior*, *Victimology*, and other professional journals and in more than a dozen books. He has addressed medical, psychiatric, psychological, forensic science, and law enforcement audiences throughout the United States and in Canada, Mexico, Australia, and the Federal Republic of Germany.

James C. Dobson received a bachelor of arts degree in psychology from Pasadena College in 1958. He was awarded a master of science degree from the University of Southern California in 1962. He earned a Ph.D. from U.S.C. in 1967 in Child Development and Research Design.

Dr. Dobson served for fourteen years as Associate Clinical Professor of Pediatrics at the University of Southern California School of Medicine, and simultaneously, for seventeen years on the Attending Staff of Children's Hospital of Los Angeles, in the Division of Medical Genetics. He was also Director of Behavioral Research in the Division of Child Development during a portion of this time.

More recently, Dr. Dobson has been President of Focus on the Family, a non-profit organization dedicated to the preservation of the home. In this capacity, he hosts a thirty minute daily radio program heard on more than eight hundred stations in seventeen countries. He is a licensed psychologist in the State of California and a licensed Marriage, Family and Child Counselor also in California. A six-film series featuring Dr. Dobson has been seen by fifty million people to date.

Dr. Dobson has been active in governmental activities since 1980. He received a special commendation from President Jimmy Carter for his work on the Task Force for the White House Conferences on the Family. He was appointed by President Ronald Reagan in 1982 to the National Advisory Commission for the Office of Juvenile Justice and Delinquency Prevention. He also served on the Citizens Advisory Panel for Tax-Reform, in consultation with President Reagan and currently serves on the Army Science Board as a family consultant for General John Wickham, Chief of Staff, United States Army.

He has published extensively both in professional journals and for individual families. His ten books for parents have sold more than four million copies. His first graduate textbook, co-edited with Dr. Richard Koch, was entitled The Mentally Retarded Child and His Family and was designated the best book in its field by the Menninger Clinic. Dr. Dobson was the principal investigator on a $500,000 grant from the National Institute of Health, studying phenylketonuric children and those with related metabolic disorders. This medical directed research was funded by the Department of Health and Human Services.

Edward J. Garcia was born in Sacramento, California. He received an associate of arts degree in pre-law from Sacramento City College in 1951. In 1958 he was awarded his LL.B. degree from the University of Pacific-McGeorge School of Law.

In 1984, President Reagan appointed Judge Garcia as United States District Court Judge for the Eastern District of California. Previously, he has served as judge of the Sacramento Municipal Court.

Judge Garcia has served as Deputy District Attorney, supervisory Deputy District Attorney, and Chief Deputy District Attorney for the Sacramento County District Attorney's office. He has also enjoyed membership in the Sacramento and California State Bar Associations. Judge Garcia has been a member of the Board of Directors of the Legal Aid Society for Sacramento and Yolo Counties, a member of the Board of Directors for the University of Pacific-McGeorge Alumni Association, a charter member of the Board of Directors of the Mexican American Educational Association, a member of the Catholic Charities Advisory Board for the Diocese of Sacramento, a member of the Board of Directors of the St. Frances Corporation, a non-profit corporation for the construction of housing for the elderly and needy. In addition, Judge Garcia has served as vice chairman for the Governing Board of the California Center for Judicial Education and Research and a lecturer at the California Judge College and as vice president of the California Judges Association.

Ellen Levine, editor-in-chief of Woman's Day and a vice president of CBS Magazines, joined CBS in 1982. Previously, Ms. Levine was the editor-in-chief and creator of Cosmopolitan Living, a lifestyle magazine published by the Hearst Corporation; and at the same time the decorating and food editor of Cosmopolitan. Mrs. Levine joined Cosmopolitan in 1976. She began her journalism career as a reporter in women's news for The Record in Hackensack, New Jersey. In addition to her editorial work, she has been published in many publications, including The New York Times.

During her career, Ellen Levine has been cited by many organizations, including receiving the Writers Hall of Fame award for her coverage of lifestyle news in 1981. A year later she was elected to the YMCA's Academy of Women Achievers; and in 1984 she was honored by the Girl Scout Council of Bergen County for outstanding professional achievement. Similar citations as a woman of achievement were also given by the New Jersey State Federation of Women's Clubs and Douglass College of Rutgers University.

Mrs. Levine is a trustee of the Elisabeth Morrow School in Englewood, New Jersey, and on the board of directors of the New Jersey Bell Telephone Company. She is also a member of Senator Bill Bradley's executive committee.

Ellen Levine is a graduate of Wellesley College, where she majored in political science and edited the college newspaper. She lives with her husband, a physician, and two sons in Englewood, New Jersey.

Tex Lezar was born in Dallas, Texas. He received a Bachelor of Arts degree from Yale College and was awarded his juris doctor degree from the University of Texas where he was editor-in-chief of the Texas Law Review. Mr. Lezar was admitted to the practice of law in Texas in 1977.

Currently in private practice in Dallas, Texas, Mr. Lezar is a partner in the firm of Carrington, Coleman, Sloman & Blumenthal. Prior to joining the firm, he had most recently served concurrently as counselor to Attorney General William French Smith and Assistant Attorney General for Legal Policy. In addition to engaging in the private practice of law, Mr. Lezar has previously served as Assistant to William F. Buckley, Jr.; Staff Assistant and Speech Writer to President Richard M. Nixon; Special Counsel to the Honorable John B. Connally, Jr.; and General Counsel to the Texas Secretary of State.

Mr. Lezar is a Fellow with the Institute of Judicial Administration. In addition, Mr. Lezar was a member of the United States Delegation to the International Conference on African Refugee Assistance II and he is a member of the Federal Judiciary Evaluation Committee of Senator Phil Gramm and a member of the American Law Institute.

The Reverend Bruce Ritter was born in Trenton, New Jersey. Father Ritter studied at St. Françis Seminary and then he went to Our Lady Queen of Peace in Middleburgh, New York. He studied philosophy at the Assumption Seminary in Chaska, Minnesota. Father Ritter began his course work in theology at St. Anthony--on-Hudson in Rensselar, New York, and completed his studies at St. Bonauenture's Theoligate in Rome. He was ordained in Rome in 1956 and received his doctorate in medieval dogma in 1958. Father Ritter is the founder and President of Covenant House, an international child care agency that operates short-term crisis centers in New York City, Houston and Toronto, as well as a long-term residential program in Antigua, Guatemala.

Father Ritter has taught at St. Anthony-on-Hudson in Rensselaer, New York, St. Hyacinth Seminary in Granby, Massachusetts, and at Canevin High School in Pittsburgh, Pennsylvania. In 1963, he was assigned to Manhattan College in the Bronx, New York as campus chaplain and professor of theology.

Father Ritter has received national recognition for his extensive work with the homeless and runaway youth. He has received the National Jefferson Award from the American Institute of Public Service in Washington, D.C., the Service to Youth award from the New York State Division for Youth, and the International Franciscan Award. Father Ritter has received honorary degrees from Amherst College, Villanova University, Boston College, and Fordham University.

Frederick Schauer is Professor of Law at the University of higan Law School. He received A.B. and M.B.A. degrees from tmouth College, and a J.D. from the Harvard Law School in 2.

Professor Schauer was formerly Cutler Professor of Law at College of William and Mary. He has also been a Visiting olar at Wolfson College, Cambridge University, and a member of law faculty in West Virginia University. Prior to entering demic life, Professor Schauer practiced law with the firm of e & Ambrogne in Boston, Massachusetts. He is a member of the of the Commonwealth of Massachusetts, and is certified to ctice before the Supreme Court of the United States.

Professor Schauer has written extensively about the law of cenity, the First Amendment, and constitutional law generally. addition to numerous articles on these subjects, he is the hor of the annual supplements to Gunther, Constitutional Law, has written two books, The Law of Obscenity, published by BNA ks in 1976, and Free Speech: A Philosophical Enquiry, lished by the Cambridge University Press in 1982. The latter k was awarded the Certificate of Merit by the American Bar ociation in 1983. Professor Schauer currently serves as Chair the Section on Constitutional Law of the Association of rican Law Schools, and has previously been Vice-Chair of the tion on Law and the Arts of the same organization. Among his er honors and awards is receipt of a National Endowment for Humanities Fellowship and selection as Professor of the Year at the School of Law of the College of William and Mary. Professor Schauer has also lectured at universities, conferences, and other gatherings throughout the world on constitutional law, legal and political philosophy, freedom of speech, and the legal and philosophical aspects of the regulation of pornography.

eanne Tilton is President of the California Consortium of
Abuse Councils (CCCAC), a Statewide network of child abuse
zations including public and privately based inter-discipl-
councils, agencies, and individuals. The Consortium
des broad-based networking, training and technical
ance to programs and agencies providing child abuse
tion and treatment in both urban and rural communities.
nsortium has also sponsored major legislation in the area
ld abuse prevention, providing over 15 million in direct
g to community programs Statewide. The California
tium of Child Abuse Councils is the State Chapter of the
al Committee for Prevention of Child Abuse. Ms. Tilton is
strative Director of the Los Angeles County Inter-Agency
l on Child Abuse and Neglect (ICAN). ICAN is one of the
t child abuse councils in the Country, including the heads
major City, County, and State departments, professional
s in every human services field, and nine community child
councils in Los Angeles County. In 1979, Ms. Tilton
zed a private sector partnership between ICAN and ICAN
iates, a private non-profit charity comprised of
ntial corporate and media representatives. This partner-
as attracted National attention for its cooperative efforts
r the development of the ICAN Neighborhood Family Center
t. This project includes the development and networking of
hensive multi-service community-based child abuse programs.
lton is a member of the Board of Directors of the National

Committee for the Prevention of Child Abuse (NCPCA). She also serves as a Commissioner on the California Attorney General's Commission on the Enforcement of Child Abuse Laws. In July, 1985 she was appointed by the California Governor to the Child Abuse Prevention Committee of the State Social Services Advisory Board. Ms. Tilton has been in the field of children's services since 1964, beginning as a Los Angeles County Social Worker. She was the County liaison between the Department of Public Social Services and the Juvenile Court when child abuse cases were initially transferred from the Probation Department to DPSS. She also served as a Supervising Children's Services Worker and later as Deputy Regional Services Administrator before being selected to administer ICAN. Ms. Tilton has been awarded commendations for her work by the National; Association of Counties, the Los Angeles County Board of Supervisors, the ICAN Associates, the Los Angeles Latino Community, the Children's Legislative Organization United by Trauma (CLOUT) and numerous other public and private organizations concerned with the welfare of children and families. She is married to Child Psychiatrist, Michael J. Durfee, M.D.

Executive Director.

Alan E. Sears served as the Executive Director for the Attorney General's Commission on Pornography. Mr. Sears previously served as the Chief of the Criminal Division and as Assistant United States Attorney for the office of United States Attorney in the Western District of Kentucky. He has extensive trial experience which includes supervision of investigations and prosecution of several obscenity law cases. Mr. Sears is admitted to the practice of law in Kentucky and before the United States district courts for the Western District of Kentucky, the Eastern District of Kentucky, the United States Tax Court, the United States Courts of Appeal for the Sixth Circuit and the District of Columbia and the United States Supreme Court.

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## Chapter 2

## Acknowledgements and Notes

One of the most difficult tasks at the conclusion of a project such as this Commission's work is in properly expressing appreciation to the countless persons who contributed to the success of the project. The Commission wishes to thank everyone who assisted in this work. The Commission also recognizes and commends the following persons and agencies for their extraordinary contributions of personnel and support.

Arlington County Police Department
Chief William K. Stover

Metropolitan Police Department
Washington, D.C.
Chief Maurice Turner

United States Postal Inspection Service
Chief Postal Inspector Charles R. Clauson

United States Customs Service
Commissioner William von Raab

Los Angeles County Department of Childrens Services
Robert Chaffee, Director
Stephen Fox, Director of Governmental Relations

Los Angeles County Sheriff's Department
Child Abuse Unit
Lt. Richard Willey

Los Angeles City Attorney's Office
Deputy City Attorney
Mary House

Los Angeles County Counsel
Chief of Juvenile Division
Larry Cory, Esquire

The Police Departments and officers of:

The City of Los Angeles, California

The City of Houston, Texas

The City of Chicago, Illinois

The City of Buffalo, New York

The City of Miami, Florida

We also express special appreciation to support work
research performed by the Federal Bureau of Investigati

Director William Webster, support personnel at the United States Department of Justice, the many persons and entities in the United States Courts, General Services Administration, Federal Protective Services and with the City of Scottsdale, Arizona, who provided hearing sites and support for our public hearings and meetings.

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# Chapter 3

## Commissioner Statements

With the reservations expressed herein, I concur in principle with the conclusions drawn by the majority. The findings contained in our report reflect a balanced assessment of the evidence heard. Ideally, I would have preferred that our condemnation of materials directly affecting behavior be couched in more forceful language, and that our recommendations for enhanced law enforcement, particularly with respect to violent and degrading materials, be likewise more pronounced. The reluctance of some Commissioners to adopt more potent language in these areas was undoubtedly attributable to the scarcity of definitive research on negative effects. While the existing body of research, particularly when coupled with the totality of the other evidence heard, well supports our findings, more corroborative research may warrant firmer control measures. Hopefully these issues will be addressed by behavioral scientists in future years.

Undoubtedly the most divisive task which confronted the Commission has been an analysis of those materials contained in Category III. This group encompasses a wide spectrum of imagery depicting sexual activity without violence, submission, degradation or humiliation. More than any other class evaluated, each Commissioner's personal value assessment of the activity portrayed encumbered objective analysis. The lack of consensus among the American people as to the morality of certain acts was quite evident among our cross-sectional composition.

From a purely social scientific perspective there is n cogent evidence that materials in this class have a predominatel negative behavioral effect. There is, however, a scarcity o research material squarely within the definitional boundaries o this Category.

Much of the research touching material representativ of this group also includes publications in other categories The scarcity of significant research in this area adds definite element of caution in assessing the behavioral effect of this class, particularly with respect to children an adolescents.

Despite the absence of clinical evidence linking Class I materials to anti-social behavior, several correlation connections are disturbing. First, it would appear that image comprising this Class may tend to encourage and promote t activity depicted. To the extent that the activity portrayed m be morally offensive, its literary propagation could be a soci problem. At least one study has indicated that prolong exposure to material in this category may cause a desensitiz attitude toward the sexual abuse of women. This evok considerable concern, especially with respect to the effect individuals with predispositions for antisocial behavior.

Turning next to an assessment of the social effects Class III materials as determined from all sources of eviden it is useful to weigh the evidence relating to each category potential harm identified by the Commission. Aside from attitudinal desensitization, there appeared to be no evident connection between items in this Class and the contention that women enjoy being raped. Several witnesses alluded to the possibility that a behavioral nexus may exist, but no persuasive evidence was introduced. However, depictions in this class do tend to promote the notion that women are inherently promiscuous and enjoy sexual exploitation. This type of imagery conveys the impression that women are fundamentally immoral and hedonistic.

The depictions featured in Category III material appear to de-emphasize the significant natural bond between sex and affection in their portrayal of adultery, fornication and sodomy. Therefore, in the final analysis, Class III material appears to impact adversely on the family concept and its value to society.

On balance, it would appear that materials in Class III have mixed effects depending on their nature and purpose. Those items which tend to distort the moral sensitivity of women and undermine the values underlying the family unit are socially harmful.

Aside from the type of harm which lends itself to a clinical degree of proof, obscenity impacts on society in a number of ways which defy scientific standards of assessment. The visible availability of obscene materials and performances in a community derogates from the family atmosphere normally fostered by local governmental policy. As Chief Justice Earl

Warren noted in Jacobellis v. Ohio, 373 U.S. 184, 199, "(t)here is a right of the Nation and States to maintain a decent society." The right to preserve a wholesome community atmosphere conducive to family development in itself warrants the control of offensive and obscene materials. Chief Justice Warren E. Burger observed in Paris Adult Theater I v. Slayton, 413 U.S. 49, 58, that the desire to maintain "the quality of life and the total community environment" is an adequate legal basis for the regulation of obscene material. Justice Harlan in his dissenting opinion in Roth v. United States, 354 U.S. 476, 505, described this governmental obligation as a "responsibility for the protection of the local moral fabric." Inherent in the comments of Chief Justice Burger, as well as those of his predecessors, i the acknowledgment of the existence of a moral and cultura texture in our society, worthy of legal protection. Toward tha end, I join Commissioner Park Elliott Dietz in his introductor comments.

Turning to the issue of law enforcement as developed in th text, my concern focuses more on the manner of expression tha the underlying conclusion. Initially, the decision to adopt c enforce obscenity laws should reside, within constitutiona limits, with the citizens of each community. Our recommendatio are predicated on the assumption that a community seeking implement these suggestions has made this threshold decision. From the evidence heard and correspondence received, it wou appear that most communities desire some degree of obsceni enforcement. However, if law enforcement officials in those communities adopt a policy of conscious oversight or neglect of obscenity cases, as has apparently happened in many jurisdictions, this may spawn a spectre of condonation. In time, an attitude of tolerance will evolve to the level of normal, and often fossilized, public policy. The necessity for reversing this course and employing our suggestions for citizen action deserves more prominence in our report.

The suggested prioritization of obscenity cases, which places the greatest emphasis on violent and degrading materials, seems appropriate. Of greater concern is the possible implication that enforcement with respect to Category III items should be de-emphasized. While prioritization of resources, like other obscenity law enforcement policy, is a matter within the prerogative of each individual jurisdiction, I do not support the suggestion that any items within the current definition of obscenity should not be prosecuted if deemed appropriate by that community. To the extent that prioritization of resources entails the commitment of personnel to long-term, complex investigations, a policy of concentration on violent and degrading materials is logical. On the other hand, the policy distinction between legally obscene materials of that type (Category I and II), and those in Category III is less persuasive when applied to cases developed by routine periodic surveys of materials on display in commercial areas. Under the latter circumstances, all materials within the legal definition of obscenity, as established by the standards of that community, should be prosecuted upon discovery.

Our suggestion that publications consisting entirely of the printed word and without imagery be exempted, except for those relating to child abuse, is disturbing. While I have never personally initiated a prosecution of a publication of that type, and cannot envision circumstances warranting such action in my community, I will not unilaterally impose my view on other jurisdictions. To the extent that our text may appear to condone a relaxation of existing obscenity laws with respect to materials comprised solely of the printed work, I depart from the majority. A decision to disregard existing law must in my view be made by the individual community affected.

I am also of the opinion that our report understates the connection between the pornography industry and organized crime. The evidence which I heard revealed more than a mere association. In my view, most elements of the pornography industry, particularly with respect to books and magazines, is directly controlled by the La Cosa Nostra, through its members or associates.

In the final analysis, I believe our final report represents as intensive an examination of the multi-faceted topic of pornography as could be conducted within our time and budgetary constraints. Every issue presented to us was considered from all points of view. Each member of our Commission made a valuable contribution of time and talent to our final product. I proud to sign the resulting report.

Henry E. Hudson

Chairman

## Statement of Diane D. Cusack

At the conclusion of our year-long effort to assess the impact of pornography on American society, it seems appropriate to add my personal thoughts on just a few aspects of deliberations and the report.

Although sometimes with the majority and other times with the minority on certain points, I believe the report fairly states both sides of any divided issues and I am proud to sign this report and to have been a part of a most intensive and intelligent look into a troublesome aspect of our society today. Our chairman, Henry Hudson, and Staff Director, Alan Sears, deserve the gratitude of the country for so keenly perceiving and discharging their uniquely important responsibilities. I know they have my admiration and thanks.

Those who seize upon our divisions do the report a great disservice. Rather, they should credit the high degree of consensus - and frequent unanimity - as a strong statement of our concern for society. Our 92 recommendations are sound and sure, and must be implemented at all levels of government if there is to be any hope of "stemming the tide" of obscenity which is flooding our environment.

There is no doubt among us that the quantity of pornography available today in America is almost overwhelming. In addition, that large portion of it which would be obscene under the Miller test is shockingly violent, degrading and perverted. It s my personal opinion that there is no one who is a consistent ser of this material who is not harmed by it. And who, in turn, ay harm others because of it. This obscene material should be rosecuted vigorously under the laws and according to our ecommendations, whether pictorial, film, or written works.

But let us not ignore that body of material which is exually explicit but not obscene under the Miller test. This aterial can also be harmful - but in a somewhat different way. lthough not prosecutable, nor recommended to be so, it nonetheless presents a cause for concern. Our report clearly states a oncern for material that is objectionable but is and should be protected by the First Amendment freedoms. The fact that it is "protected speech" does not automatically remove its objectionable character. For 2500 years of western civilization, human sexuality and its expressions have been cherished as a private act between a loving couple committed to each other. This has created the strongest unit of society - the family. If our families become less wholesome, weaker, and less committed to the fidelity that is their core, our entire society will weaken as well. People who consistently use the materials we have studied - and children who inadvertently are exposed to them - are not made better persons for it. No pornographer has ever made that claim. And those who insist that these materials do no harm had better be right, for the risks to our future are substantial. These materials, whose message is clearly that sexual pleasure and self-gratification are paramount, have the ability to seriously undermine our social fabric. It is the individual our great nation who must see this, and reverse the trend - the government. Chapter 7 of Part Four the Report addresses issue quite well.

Aristotle has taught us for years that a society concern itself with virtue. "Otherwise . . . law becomes a contract or mutual guarantee of rights, and quite unable to citizens good and just, which it ought to do . . . ." I this "good and just" society which America has enjoyed from beginning. It became so because its people had a sh respect, a unifying vision, a common understanding of man's p in the world. We have a phenomenon today, in the perva presence of sexually explicit materials, that challenges on those understandings held by society for thousands of yea that sex is private, to be cherished within the context of l commitment, and fidelity. We can use this wondrous gif create or destroy, to rule or be ruled, to honor each othe debase each other. This Report provides an abundance of info tion, and the conclusions of a community of eleven citi The American people must now decide what to do with it.

pages tightly bound

## STATEMENT OF PARK ELLIOTT DIETZ, M.D., M.P.H., PH.D.[1]

In recent decades there has been a desirable trend toward using empirical evidence to test long-held assumptions underlying legal doctrine and procedure and to rely on social science evidence to make better-informed judgments about difficult questions of law and social policy. Social science has given good service in answering questions about adequate jury size, in determining public perceptions of trademark products, in profiling skyjackers, in sentencing convicted criminals, and in limiting the exclusionary rule. But social science is too new on the historical scene to have developed adequate data on every important social problem, too little funded to have amassed all the data desired, and too positivistic to tell us what we should do, particularly when competing interests are at stake.

The 1970 Commission on Obscenity and Pornography went so far in attempting to rely on social science evidence that a majority of its members took the absence of experimental evidence of causation of antisocial behavior or sexual deviance as a basis for urging the deregulation of obscenity. The present Commission did not limit its inquiry to the products of social science research. While in this respect we depart from the tradition of one predecessor Commission, we do not depart from the tradition of those who have been charged with formulating social policy for the whole of human history. Every time an emperor or a king

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[1] Commissioner Cusack concurs in this statement.

or a queen or a president or a parliament or a congress or
legislature or a court has made a judgment affecting soci
policy, this judgment as been made in the absence of absol
guidance from the social sciences. The Constitutional Conver
ion of 1787 had no experimental evidence to guide its decisi
making. When the First Congress proposed the First Amendment
1789 and when it was ratified by the states in 1791 and made
part of the Constitution, the empirical social sciences had
yet been conceived.

As in public policy, decision makers in medicine mu
exercise their best judgment in the face of uncertainty, bei
guided by science as far as it takes us, being guided by
commitment to the well being of individuals and of society,
being guided by sensitivity toward those situations in which
best interests of an individual conflict with the best intere
of society. It is within this framework that I have tried
make my own best judgments about pornography while serving on
Commission. At every step in our joint decision making,
medical and public health consequences have been in the forefr
of my concerns. These consequences are not widely recogniz
for which reason I devote most of my personal statement to
overview of these.

Before the Commissioners had even met one another,
press had begun to suggest bias among the Commissioners and
wave red flags of censorship. Now, before our report has e
gone to the printer, there have already been claims that we

too liberal, that we are too conservative, that we have gone too far, that we have not gone far enough, that we have ignored evidence showing how innocuous pornography is, and that we have ignored evidence showing how destructive pornography is. In short, there are those who have rejected our findings before the report has even been issued, and I have no doubt many more will do so in the future without having read it. Likewise, but for somewhat different reasons, there will be those who accept our findings without having read our report. This is equally risky. Our report is meant to be read, and I encourage every adult in America to do so before accepting or rejecting our findings.

The reader should be forewarned, however, that our report contains offensive materials. Some readers will be offended by quoted language, particularly the titles of magazines, books, and films that we considered. But the offensiveness of some of the quoted language is nothing when compared to the suffering described by victims whose accounts are quoted in the victimization chapter. This is not bedtime reading. As with the practice of medicine, one must sometimes cause discomfort to effect a cure, and it was our judgment that the public and the truth would be best served by including certain discomforting materials in the report.

I came to the Commission with personal views on pornography which were based on intellectual and humanitarian concerns and on certain noncontroversial ethical principles; the morality of pornography was the farthest thing from my mind. Thus, I was astonished to find that by the final meeting of the Commissio pornography had become a matter of moral concern to me. Wh other Commissioners may have learned things about the dark s of life that they had never known, I remembered something ab the higher purposes of life and of humanity's aspirations tha had forgotten during too many years working on the dark side. therefore conclude my remarks with statements on morality an freedom that would have seemed foreign to me not many months

## I. Pornography And Health

### A. Abuse of Persons Used in Production

Pornography is a medical and public health problem bec people, particularly women and children, are abused in production of certain pornographic materials. People have beaten, forced to engage in sexual acts, held prisoner, bound gagged, and tortured for purposes of producing pornography. the course of these events they have been exposed to the ris acquiring sexually transmitted diseases. Some have been supp with narcotics. Of course, these crimes could have been pros ted in their own right, even if there were no obscenity or c pornography laws. Moreover, the market for pornography is, a all, but one of several motives for the commission of t crimes, all of which also occurred before the inventio photography. If these were the only adverse health conseque of pornography, the most straightforward remedy woul regulation of the pornography industry to assure safe and labor practices. But these are not the only adverse he consequences of pornography.

B. Injurious Products

Pornography is a medical and public health problem because pornographic retail outlets of the "adults only" variety sell products under the pretext of health and recreation that are the instruments of injury, both intentional and unintentional. People have suffocated in bondage hoods. People have asphyxiated and burned to death in handcuffs and bondage restraints. People have been raped and lacerated with dildos. People have had "sexual aid" devices entrapped in body cavities, requiring extraction at hospital emergency wards. People have died from orally ingesting volatile nitrites and have suffered cerebrovascular injury from inhaling these same chemicals, sold as aphrodisiacs under various pretext labels in these establishments. People have been abducted and have been conned into exiting their vehicles or allowing strangers into their homes when offenders have shown them phony police badges, sold as "novelties" in some of these establishments. People have been robbed and put in fear of their life by offenders who have wielded phony guns, also sold as "novelties" in some of these establishments. If these were the only adverse health consequences of pornography, the most straightforward remedies would be public education, regulation of some of these products through food and drug law and others through criminal sanctions, and tort actions by the injured against producers and distributors of inherently dangerous products and products that were negligently designed, marketed, labeled, and sold. But these are n the only adverse health consequences of pornography.

C. Vice Centers

Pornography is a medical and public health problem becau pornographic retail outlets of the "adults only" variety are t most visible service stations of the vice industry. The peep-show booths, with their locking doors, are the self-servi pumps, as evidenced by the body fluids on their floors and wall The openings in the walls of the booths allow anonymous a casual sexual contact, making it impossible to trace the dono and recipients of sexually transmitted diseases. The establishments draw muggers to a pool of victims who are somewh disinclined to report a robbery to the police. These establishments signal members of the community and visitors th full vice services may be available nearby through prostitut and drug dealers and, if not so directly available, are a pho call away through the advertisements found in tabloid periodicals, and sex-for-sale guides. If these were the or adverse health consequences of pornography, the mo straightforward remedy would be to prohibit retail sales exce through the mail. But these are not the only adverse heal consequences of pornography.

D. Sexual Disinformation

Pornography is a medical and public health problem becau so much of it teaches false, misleading, and even dangero information about human sexuality. A person who learned abo human sexuality in the "adults only" pornography outlets of America would be a person who had never conceived of a man and woman marrying or even falling in love before having intercourse, who had never conceived of two people making love in privacy without guilt or fear of discovery, who had never conceived of tender foreplay, who had never conceived of vaginal intercourse with ejaculation during intromission, and who had never conceived of procreation as a purpose of sexual union. Instead, such a person would be one who had learned that sex at home meant sex with one's children, stepchildren, parents, stepparents, siblings, cousins, nephews, nieces, aunts, uncles, and pets, and with neighbors, milkmen, plumbers, salesmen, burglars, and peepers, who had learned that people take off their clothes and have sex within the first five minutes of meeting one another, who had learned to misjudge the percentage of women who prepare for sex by shaving their pubic hair, having their breasts, buttocks, or legs tattooed, having their nipples or labia pierced, or donning leather, latex, rubber, or child-like costumes, who had learned to misjudge the proportion of men who prepare for sex by having their genitals or nipples pierced, wearing women's clothing, or growing breasts, who had learned that about one out of every five sexual encounters involves spanking, whipping, fighting, wrestling, tying, chaining, gagging, or torture, who had learned that more than one in ten sexual acts involves a party of more than two, who had learned that the purpose of ejaculation is that of soiling the mouths, faces, breasts, abdomens, backs, and food at which it is always aimed, who had learned that body cavities were designed for the insertion of foreign objects, who had learned that the anus was a genital to be licked and penetrated, who had learned that urine and excrement are erotic materials, who had learned that the instruments of sex are chemicals, handcuffs, gags, hoods, restraints, harnesses, police badges, knives, guns, whips, paddles, toilets, diapers, enema bags, inflatable rubber women, and disembodied vaginas, breasts, and penises, and who had learned that except with the children, where secrecy was required, photographers and cameras were supposed to be present to capture the action so that it could be spread abroad. If these were the only adverse health consequences of pornography, the most straightforward remedy would be to provide factually accurate information on human sexuality to people before they are exposed to pornography, if only we could agree on what that information is, on who should provide it to the many children whose parents are incapable of doing so, and on effective and acceptable means by which to ensure that exposure not precede education. In the absence of such a remedy, the probable health consequences in this area alone are sufficient to support recommendations that would reduce the dissemination of that pornography which teaches false, misleading, or dangerous information about human sexuality. And these are not the only adverse health consequences of pornography.

### E. Encouraging Social Behavior with Adverse Health Consequences

Pornography is a medical and public health problem because it encourages patterns of social behavior which have adverse health consequences. The person who follows the patterns of social behavior promoted by pornography is a person for whom love, affection, marriage, procreation, and responsibility are absolutely irrelevant to sexual conduct. We do not need research to tell us that such persons on the average contribute more than other persons to rates of illegitimacy, teenage pregnancy, abortion, and sexually transmitted diseases. If these were the only adverse health consequences of pornography, the most straightforward remedy would be to more effectively encourage responsible sexual behavior, if only we knew how. In the absence of such a remedy, the probable health consequences in this area alone are sufficient to support recommendations that would reduce the dissemination of pornography. And these are not the only adverse health consequences of pornography.

### F. Fostering Attitudes with Adverse Health Consequences

Pornography is a medical and public health problem because it increases the probability that members of the exposed population will acquire attitudes that are detrimental to the physical and mental health of both those exposed and those around them. The social science evidence adequately demonstrates that even in experimental samples of mentally stable male college students, exposure to violent pornography leads to measurable, negative changes in the content of sexual fantasies, attitudes toward women, attitudes toward rape, and aggressive behavior within the experimental setting. Analogous results of exposure to nonsexual media violence have been well-documented for even longer. Although too few experiments have clearly tested the effects of degrading pornography, there are suggestions in the few existing studies that exposure to degrading pornography has negative effects in the experimental setting, including eliciting anxiety, depression, and hostility. Biographical accounts of individuals go beyond the experimental evidence in attributing changes in male sexual attitudes and demands to pornography, including nonviolent pornography, and in documenting adverse consequences to women and children of the behavior of these men. Some of these accounts include persuasive examples of direct and immediate imitation and of long-term modeling effects. Moreover, the existing population-based evidence for the United States shows a correlation between circulation rates of magazines containing pornography (primarily of a nonviolent type) and rates of reported rape in the fifty states during the same time period, even after many other factors were statistically controlled. In my opinion, we know enough now to be confident in asserting that a population exposed to violent pornography is a population that commits more acts of sexual brutality than it otherwise would and to suggest somewhat less confidently that the same is probably true of a population exposed to degrading pornography. Even if these were the only adverse health consequences of pornography, there would be no straightforward remedies for these consequences short of reducing the exposure of the population to violent and degrading pornography. And these are not the only adverse health consequences of pornography.

### C. Instruments of Sexual Abuse

Pornography is a medical and public health problem because it is used as an instrument of sexual abuse and sexual harassment. Pornography of all types is used in the sexual abuse of children to instruct them on particular sexual acts and to overcome their resistance by showing them what adults do and by intimidating them about the painful things that might be done to them if they fail to comply. Pornography of all types is used to instruct women in the sexual behaviors that men desire of them but which they have "failed" to provide, forcing women who have or see no other options to choose between the feelings of inadequacy that accompany refusal and the feelings of self-loathing that accompany compliance. Pornography of all types is used to harass women in the workplace and to remind them into whose world they are intruding, leading to feelings of shame, disgust, and powerlessness. Even if these were the only adverse health consequences of pornography, there would be no straightforward remedies for these consequences short of reducing the quantity of pornography in circulation. And these are not the only adverse health consequences of pornography.

### H. Presumed Corruption of Children

Pornography is a medical and public health problem because it falls into the hands of children, who must be assumed vulnerable to adverse mental health consequences unless and until proved otherwise. Although experiments to test this assumption pose potentially insurmountable ethical dilemmas, it should be possible to design studies to examine the responses of children who have been exposed to pornography in other ways, such as negligent parental storage. Such studies would require safeguards to protect the child against any further harm and a suitable control group, such as children whose parents possess pornography to which the children were not exposed. To date, the effects of exposure on young children are unknown, but it would be as imprudent to assume no negative health consequences of pornography on children as it would to make such an assumption about a drug that had not been properly tested. Even if the assumed harms to exposed children were the only adverse health consequences of pornography, there would be no straightforward prevention or remedy for these consequences short of reducing the quantity of pornography in circulation. And these are not the only adverse health consequences of pornography.

## I. The Limits of Obscenity and Child Pornography Laws in Reducing the Adverse Health Consequences of Pornography

The adverse health consequences of pornography are not limited to a single class of pornographic materials, though the various classes have differing health consequences. Most importantly perhaps, the adverse health consequences of pornography are not limited to materials that are legally obscene or that violate child pornography law. Thus, existing laws, even if enhanced and enforced as recommended in this report, are insufficient to prevent the adverse health consequences attributable to pornography. Obscenity law is designed to suppress the offensive, but on medical and public health grounds it would be more desirable to suppress the harmful. To the extent that the obscene and the harmful overlap, obscenity law is a powerful tool of health promotion. But if the adverse health consequences of pornography are to be minimized, strategies other than effective enforcement of obscenity law and child pornography law will be necessary. In addition to the strategies that increase the effectiveness and enforcement of existing law, the nation's health requires a creative search for countermeasures against the adverse health consequences of non-obscene, non-child pornography, which will inevitably survive law enforcement efforts directed against obscenity and against child pornography. In this search, we must inevitably come to terms with the need for appropriate sex education.

The Commission report endorses citizen actions that could help reduce the adverse health consequences of non-obscene, non-child pornography, but the report is necessarily unclear on the nature and extent of this class of materials. This lack of clarity carries with it the risk that citizen action will be misdirected. To the extent that citizens care to base their actions against non-obscene material on its medical and public health consequences, they will do more to promote health if they insure that their efforts encompass violent and degrading images, especially sexually violent and degrading images. Unhealthy as some nonobscene pornography may be, it is not as unhealthy as detective magazine covers depicting violence toward a woman whose sexual characteristics are emphasized, horror films depicting girls or women undressing moments before the villain pounces upon them, or televised depictions of violence toward alluring, glamorous, and wanton women. Like rape itself, violent pornography is not so much about sex as about violence. It is no distortion of the language to refer to violence that is not sexually explicit as pornography. The word "pornography" derives from the Greek for the writings of prostitutes, and the life of the prostitute is as much a life of violence as it is a life of sex. If sexually stimulating materials that are nonviolent, nondegrading, and nonobscene have beneficial health consequences, the most important among them must be that they distract attention from materials that are violent and degrading.

## II. Pornography And Morality 2

Acting as a whole, the Commission attempted to provide a reasoned analysis of the permissible and desirable relationships between government and the regulation of sexually explicit materials, including the rights of citizens to take private action. As a governmental body, we studiously avoided making judgments on behalf of the government about the morality of particular sexual acts between consenting adults or their depiction in pornography. This avoidance, however, should not be mistaken for the absence of moral sentiment among the Commissioners.

I, for one, have no hesitation in condemning nearly every specimen of pornography that we have examined in the course of our deliberations as tasteless, offensive, lewd, and indecent. According to my values, these materials are themselves immoral, and to the extent that they encourage immoral behavior they exert a corrupting influence on the family and on the moral fabric of society.

Pornography is both causal and symptomatic of immorality and corruption. A world in which pornography were neither desired nor produced would be a better world, but it is not within the power of government or even of a majority of citizens to create such a world. Pornography is but one of the many causes of immorality and but one of its manifestations.

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2 Chairman Hudson, Commissioners Dobson, Lezar, Garcia and Cusack concur in this section.

Nonetheless, a great deal of contemporary pornography constitutes an offense against human dignity and decency that should be shunned by the citizens, not because the evils of the world will thereby be eliminated, but because conscience demands it.

III. Pornography And Freedom

When Andrea Dworkin challenged us to find the courage "to go and cut that woman down and untie her hands and take the gag out of her mouth, and to do something, to risk something, for her freedom," I cried. And I still cry at that image, even as I write, because if we do not act with compassion and conviction and courage for the hostages and victims of the pornographers we do not deserve the freedoms that our founding fathers bequeathed us. It has been nearly two centuries since Phillipe Pinel struck the chains from the mentally ill and more than a century since Abraham Lincoln struck the chains from America's black slaves. With this statement I ask you, America, to strike the chains from America's women and children, to free them from the bonds of pornography, to free them from the bonds of sexual slavery, to free them from the bonds of sexual abuse, to free them from the bonds of inner torment that entrap the second-class citizen in an otherwise free nation.

APPENDIX

To elucidate one example of the types of material that are probably not obscene under the Miller test but which should be high on any list of media depictions posing risks to health, I append an article that I coauthored, with appreciation to the Journal of Forensic Sciences in which it was published and the American Society for Testing and Materials which holds the copyright for permission to include it here.

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*Robert R. Hazelwood,*[3] *M.S.*

# Detective Magazines: Pornography for the Sexual Sadist?

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**REFERENCE:** Dietz, P. E., Harry, B., Hazelwood, R. R., **"Detective Magazines: Pornography for the Sexual Sadist?"** *Journal of Forensic Sciences*, JFSCA, Vol. 31, No. 1, Jan. 1986, pp. 197-211.

**ABSTRACT:** The origins of detective magazines can be traced to 17th and 18th century crime pamphlets and to 19th century periodicals that Lombroso called "really criminal newspapers." Content analysis of current detective magazines shows that their covers juxtapose erotic images with images of violence, bondage, and domination; that their articles provide lurid descriptions of murder, rape, and torture; and that they publish advertisements for weapons, burglary and car theft tools, false identification, and sexual aids. Six case histories of sexual sadists illustrate the use of these magazines as a source of fantasy material. We postulate that detective magazines may contribute to the development of sexual sadism, facilitate sadistic fantasies, and serve as training manuals and equipment catalogs for criminals. We recommend that detective magazines be considered during policy debates about media violence and pornography.

**KEYWORDS:** psychiatry, criminal sex offenses, deviant sexual behavior, detective magazines, sexual sadism, pornography, criminal behavior, sexual homicide

A class of popular periodicals known as "detective magazines" has apparently eluded the attention of researchers and commentators concerned with media violence and pornography. These magazines provide factual accounts of crimes and criminals, and are thereby distinguished from mystery fiction. They rarely contain photographs of nudes, and are thereby distinguished from those publications that most individuals casually refer to as erotic, pornographic, or obscene.

In this paper, we review the historical roots of these detective magazines, report data on the content of current detective magazines, present six case histories in which detective magazines were a source of fantasy material, and discuss the possible psychiatric and criminologic significance of detective magazines.

We postulate that detective magazines serve as pornography for sexual sadists. The works of the Marquis de Sade and his literary disciples, though known outside the literati, are too

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An earlier version of this paper was presented by the authors in a panel entitled "Bloody Instructions: Intolerable Crimes in Mass Market Magazines" at the Annual Meeting of the American Academy of Psychiatry and the Law, New York, NY, 24 Oct. 1982. Received for publication 6 May 1985; accepted for publication 31 July 1985.

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erudite and too remote in setting from everyday life to appeal to the sexual sadist of average intelligence and educational level. In contrast, detective magazines depict and describe sadistic acts in familiar settings, using the imagery and language of tabloid newspapers. This class of periodicals receives little commentary in comparison with those that are considered obscene or pornographic on the basis of their explicit use of erotic imagery. Detective magazines characteristically pair violent and sadistic images with erotic images, yet are more accessible for purchase by young persons than are magazines that depict naked bodies.

## The Origins and Readership of Detective Magazines

Periodicals reporting crime are thought to have originated in 17th century England [*1*]. Crime pamphlets and related publications appeared at a time when oral renditions of crime were still provided by street merchants for a fee. Around 1864, Mayhew described "death hunters" and "running patterers" who were paid to shout out stories of crimes [*2*]. Death hunters went to the scenes of murders and reported on the details of the killings; running patterers fabricated or embellished the stories of infamous crimes. Mayhew also described "caravan shows," a form of "peep show" in which carts containing a miniature stage, curtains, and scenery were used by puppeteers to reenact infamous murders [*3*].

Crime pamphlets flourished throughout 18th century England and appeared in America during the last half of that century. By the middle of the 19th century, as British and American journalists embraced sensationalism [*4*], the chaotic relationship between crime and law enforcement [*5*] found its natural literary outlet. Gradually, newspapers and crime magazines began to replace other forms of information about crime.

The first financially successful American crime magazine was *The National Police Gazette*, which appeared in 1845 [*6*]. This magazine was highly celebrated, and at least 22 related magazines followed in its wake [*7-9*]. The *Gazette* survived well into the 20th century. We examined all issues of the *National Police Gazette* from its first year of publication. Initially, it featured stories of actual crimes and made modest use of woodcut illustrations. There were many advertisements for home remedies, sexual enhancement and augmentation preparations, trusses, clothing, hats, boots, jewelry, guns, and "cheap" books. By the late 19th century, the *Gazette* was printed on pink paper and had detailed illustrations of shootings, stabbings, hangings, and debauchery, as well as graphic descriptions of bareknuckle boxing, wrestling, and cockfights. Advertisements offered revealing photographs of women; treatments for venereal diseases, impotence, and "self abuse"; and the services of lawyers and detectives. The *Gazette* was "for some years the most widely circulated of weekly journals" [*10*].

The *Gazette's* decline began around 1920, and "modern" detective magazines appeared by 1924. They were quickly assessed as having virtually no cultural value [*11,12*], and they proliferated. More than 20 are currently published on a regular basis. Four detective magazines for which data were available had a combined monthly circulation of 996 000 issues in about 1980 [*13*].

Otto examined eleven detective magazines as part of a larger study of newsstand magazines in the 1960s and found that they offered the most sexual and nonsexual violence of all general circulation magazines, even though his data excluded advertisements and covers [*14*]. Reporting on the content of two detective magazines, Lyle noted that "the stories in general are fairly explicit in describing what kind of violence was committed, how it was done, and to what effect" [*15*]. Beattie studied one issue each of *Official Detective* and *True Detective* as part of his study of mass market magazines and concluded that detective magazines were among those with the most violent content [*16*].

The readership of detective magazines has not been identified. Lazarsfeld and Wyant included 1 detective magazine in their study of reading habits in 90 American cities [*17*], but their statistical analysis excluded the genre. Freidman and Johnson surveyed media use among "aggressive" and "nonaggressive" eighth and ninth grade boys, 20% of whom read "crime and detective magazines"; differences between the two groups in amount and type of magazine reading were not significant [*18*]. In contrast, Lyle and Hoffman reported that 9% of a sample of sixth grade boys and girls, and 6 and 7%, respectively, of a sample of tenth grade boys and girls, preferred to read "detective/mystery" magazines [*19*]. Whether these data refer to such magazines as *Alfred Hitchcock's Mystery Magazine* and *Ellery Queen's Mystery Magazine* or to the detective magazines considered here is not known. Thus, there is no audience whose rate of use of detective magazines is known.

## The Content of Detective Magazines

Detective magazines are readily available at newsstands, drugstores, supermarkets, convenience stores, and elsewhere. One copy of each detective magazine issue available on a single day at ten suburban Boston stores was purchased and studied in detail. The mean purchase price was $1.11; the range was from $0.95 to $2.50. These magazines generally were displayed along with women's, "confession," and children's magazines, usually adjacent to adventure and gun magazines, and always on a different rack from espousedly erotic men's magazines. We have subsequently confirmed these observations regarding display patterns in stores in Charlottesville, VA; Chicago, IL; Columbia, MO; Houston, TX; Kansas City, MO; Los Angeles, CA; New York, NY; St. Louis, MO; Washington, DC; Toronto, Ontario, Canada; and Melbourne, Victoria, Australia.

Nineteen detective magazine issues, representing eighteen different titles from six publishers, were studied. They were: *Detective Cases, Detective Diary, Detective Dragnet, Detective Files, Detective World, Front Page Detective, Guilty! The Best from True Detective, Headquarters Detective, Homicide Detective, Inside Detective, Master Detective, Offical Detective Stories, Police Detective* (two issues), *Real Detective, Startling Detective, True Detective, True Police Cases*, and *True Police Yearbook*.

We analyzed several aspects of the content of these 19 issues. First, we analyzed the violent and sexual imagery in photographs used for front covers, article illustrations, and commercial advertisements. Second, we analyzed the words expressive of violence and sexuality used in the titles of articles promoted on the front covers and listed in the tables of contents. Third, we analyzed the textual content of articles for descriptions of violent and sexual behavior. For this third purpose, a stratified, random sample of 38 articles was selected (2 articles randomly selected from the signed articles in each issue). The results of these content analyses are presented in the following sections.

### *Illustrations*

The covers of the 19 magazines bore 21 photographs. The most common image on front covers was that of a woman in an inferior or submissive position. Seventy-six percent of the cover photographs showed domination and submission imagery. Men dominated women in 71% of cover pictures, while women dominated men in 5%. Some pictures showed a woman alone in a submissive or subjugated position. Bondage was depicted in 38% of the cover pictures, and all of the bound subjects were women. Ropes, chains, handcuffs, and cloth were used to achieve this bondage with equal frequency. In order of decreasing frequency, other repetitive cover imagery included violent struggles, brassieres, guns, accentuated breasts, strangulation, corpses, blood, and knives or other cutting instruments. Table 1 shows the percentages of each type of image in covers, articles, and advertisements.

In contrast to the cover photographs, the illustrations accompanying articles most often pictured buildings or other settings and conventionally dressed people. Law enforcement personnel were often shown processing a crime scene or working at a desk; they were always men. Violent and erotic imagery was much less prevalent in article photographs than in cover photographs. When it did occur, the most prevalent form was domination and submission imagery.

TABLE 1—*Percentages of photographs depicting particular types of images in detective magazine covers, articles, and advertisements.*

| Images | Covers ($N = 19$) | Articles ($N = 891$) | Advertisements ($N = 926$) |
|---|---|---|---|
| Bondage and domination imagery | | | |
| bondage | 38 | 5 | 0.1 |
| domination | 76 | 36 | 0 |
| Struggles | | | |
| strangulation | 14 | 0.6 | 0 |
| other violent struggles | 29 | 2 | 3 |
| Weapons | | | |
| guns | 29 | 4 | 6 |
| knives or other cutting instruments | 14 | 0.7 | 2 |
| blunt instruments | 5 | 0.8 | 2 |
| bombs | 5 | 0.1 | 0 |
| saws | 5 | 0 | 3 |
| other weapons[a] | 0 | 1.5 | 0.1 |
| Sadistic imagery | | | |
| corpses | 14 | 3 | 0 |
| blood | 14 | 1 | 0 |
| mutilation/slashing | 0 | 0.3 | 0 |
| Body parts | | | |
| breasts accentuated | 24 | 1 | 3 |
| buttocks accentuated | 5 | 0.2 | 2 |
| genitals | 0 | 0 | 2 |
| Clothing | | | |
| brassiere | 29 | 1 | 3 |
| negligee | 5 | 2 | 0 |
| panties | 0 | 2 | 4 |
| other "erotic" clothing[b] | 0 | 1.5 | 3.1 |
| Sexual behaviors | | | |
| intercourse[c] | 0 | 0.1 | 3.2 |
| masturbation | 0 | 0 | 1 |
| crossdressing | 0 | 0.2 | 0.1 |

[a] Includes fire, whips, gas chambers, gallows, and brass knuckles.

[b] Includes stockings, garters, hoods, exaggerated shoes and boots, and constrictive waist garments.

[c] Includes heterosexual and homosexual genital intercourse, fellatio, cunnilingus, and anal intercourse.

Men dominated women in 5% of the article pictures, and women dominated men in less than 1%. Individuals were most often bound with ropes or handcuffs, less commonly with leather, chains, or cloth.

In illustrated, commercial advertisements (that is, excluding classified advertisements), potential weapons such as guns, knives, blunt instruments, or saws were depicted slightly more often than body adornments such as panties, brassieres, or stockings. The guns, knives, and blunt instruments were for sale. The saws appeared in advertisements offering instruction in sharpening saws. Undergarments most often appeared in the illustrations of advertisements for other merchandise.

Seventy-three advertisements in our sample promoted enhancement of sexual control, appeal, or function. Detective or law enforcement training was advertised in 68. Fifty-nine promoted "official" photographic identification cards, police badges, or other means of certifying identity. Mind control techniques were offered in 35 advertisements. Female wrestlers were depicted in 18, and male wrestlers in 9. Most issues had advertisements for mail-order brides, lonely hearts clubs, "locksmith training," and equipment for picking locks, opening car doors, duplicating keys, and building handgun silencers.

### *Titles and Text*

The titles of articles are similar in construction and terminology among detective magazines. Compare, for example, the titles from two magazines published two years apart by two different publishers: "A TRUNK-FULL OF FLESH"; "CANADA'S NUMBER 1 MURDER MYSTERY"; "MURDER BY FREIGHT TRAIN"; "ANNA TOOK THE BLADE 90 TIMES!"; "SEX COP'S DEATH CHAMBER"; "IT TAKES A COP"; "OLD FRIENDSHIPS DIE EASY WITH A .38"; "PORTLAND'S BLOODY SUMMER"; and "TORTURE-SLAYER OF EL TORO" (*Startling Detective*, Vol. 73, No. 3, May 1983, published by Globe Communications Corp.); "SATANIST SMILED AS HE SNUFFED THE SNITCH!"; "ROAST A FAMILY OF SIX!"; "BULLET BARRAGE KO'D THE BOXING REF!"; "WHO LEFT THE NAKED MAN'S HEAD SOAKED IN GORE?"; "THE HOLY VAMPIRE DRANK HIS VICTIM'S BLOOD!"; "WHO BLEW THE BICKERING COUPLE AWAY?"; "WEIRD FETISHES OF WASHINGTON'S RAPE-SLAYER!"; " 'HE WAS PLAYING HERO, SO I SHOT THE S.O.B.!' "; "ORDEAL OF THE KIDNAPPED GIRL IN THE PIT!"; and "LETHAL LESSON: NEVER MESS WITH A MARRIED MAN!" (*Front Page Detective*, Vol. 48, No. 5, May 1985, published by RGH Publishing Corp.).

The magazine covers gave the titles of 77 of the 186 articles listed in the tables of contents. Table 2 shows the percentages of words about particular themes on the covers and in article titles. Words describing various forms of killing were most prevalent and included "kill," "murder," "execute," "slay," and "hit-man." Roles described included "stranger," "lover," "victim," "bride," "dame," "whore," "slut," "gigolo," and "mistress." Descriptors of mental states and traits included "crazy," "mad," "maniac," "greed," "treachery," "lust," and "hang-ups." Death-related words included "dead," "body," "corpse," "graveyard," "cemetery," "coffin," and "bloodthirsty." While law enforcement words such as "detective," "police," "crime," "case," and "cop" appeared in the names of every magazine, they were less commonly used in article titles. Sexual terms such as "rape," "gay," "drag," and "sex" made up the next most prevalent category. As can be seen in Table 2, the rank order of themes identified in article titles in the tables of contents was nearly identical to that for articles listed on covers.

In the 38 articles sampled for analysis, there were 40 killings. Fifteen involved torture, and the other twenty-five were less protracted murders of helpless victims. There were 44 episodes

TABLE 2—*Percentages of detective magazine article titles mentioning particular themes.*

| Theme | On Cover ($N$ = 77) | In Table of Contents ($N$ = 186) |
|---|---|---|
| Killing | 38 | 32 |
| Roles | 36 | 24 |
| Mental state | 34 | 16 |
| Death | 30 | 15 |
| Law enforcement | 25 | 10 |
| Sex | 19 | 14 |
| Strangulation | 9 | 5 |
| Weapons | 9 | 5 |
| Mutilation | 6 | 4 |
| Relentless pursuit | 6 | 3 |
| Secret location | 5 | 3 |
| Life | 3 | 2 |

of sexual violence (including 13 sexual mutilations), 14 robberies, and 3 burglaries. The incidents described included 50 shootings, 40 stabbings, 14 strangulations, 10 episodes of being bound and gagged, 7 bludgeonings, 3 burnings, 1 poisoning, and 1 electrocution.

Personal characteristics of victims and perpetrators were usually specified, adding to the credibility of the articles. Forty-seven perpetrators acted against ninety-eight victims. The offenders included 43 males and 4 females; the victims were 42 males and 56 females. When age was mentioned, offenders were usually between 15 and 35, while their victims were usually either 15 to 25 years old, or older than 46. Of the cases identifying race, 12 of 35 offenders and 4 of 44 victims were black. Twenty perpetrators were described as having been previously engaged in criminal activity, and seven were noted to have a history of psychiatric disorder. Five of the offenders were killed during gun battles with police, and all others went to trial. The insanity defense was raised in 13 trials, but only 1 defendant was acquitted by reason of insanity. The death sentence was given five times; three prisoners had been executed when the articles were written. Twenty-two victims were strangers, twelve were friends or acquaintances, and nine were lovers. Two male victims were noted to have been homosexual, and at least seventeen female victims were prostitutes. Men were killed, but virtually never sexually molested; women were almost always sexually attacked before being killed.

Many of the articles contained detailed descriptions of violent acts. Colorfully explicit descriptions of wounds and crime scenes were universal. Stalking or surveillance of the victim, methods of investigation, investigative reconstruction of the events, and crime laboratory work were commonly described. Networks of informants played a pivotal role in almost all investigations, and extensive media publicity was emphasized. Arrests tended to be rapid and overpowering. Extensive coverage was afforded to trials, verdicts, and sentences. Many articles ended by reporting a substantial prison sentence and reminding the reader that the offenders, or others like them, were still at large or might soon be.

## Case Reports

The following six case histories illustrate how detective magazines are used as a source of fantasy material. The facts are drawn from investigative files submitted to the FBI Academy Behavioral Science Unit (Cases 1, 5, and 6) or from case files developed in the course of forensic psychiatric evaluations (Cases 2, 3, and 4). Cases 1 and 2 depict multiple murderers who enjoyed detective magazines. The offender in Case 3 used detective magazines during masturbation, but reportedly never acted out his most extreme fantasy scenarios. The pedophile in Case 4 used detective magazines to facilitate his masturbation fantasies and may have begun to act out those fantasies. The offender in Case 5 used detective magazines in the commission of his offense. Case 6 describes the victim of an autoerotic fatality, who used detective magazines in the course of acting out his fantasies.

### *Case 1*

A multiple murderer of the late 1950s had a collection of the covers of detective magazines. He told police investigators that he liked detective magazines "sometimes for the words, sometimes for the covers."

He approached two of his victims on the pretext that he wished them to model bondage scenes for detective magazines. In his statement to the investigating officers he said:

> I told her that I wanted to take pictures that would be suitable for illustrations for mystery stories or detective magazine stories of that type, and that this would require me to tie her hands and feet and put a gag in her mouth, and she [was] agreeable to this, and I did tie her hands and feet and put a gag in her mouth and I took a number of pictures, I don't remember exactly how many, of various poses and changing the pose from picture to picture.

He acknowledged that he never had any intention of submitting the photographs for publication, and added that he was impotent in the absence of bondage.

*Case 2*

A 35-year-old, married, white man was charged with approximately a dozen murders in several states.

He had never known his father, who had been executed for murdering a police officer and who also had killed a correctional officer during an escape. Shortly before being executed the father wrote: "When I killed this cop, it made me feel good inside. I can't get over how good it did make me feel, for the sensation was something that made me feel elated to the point of happiness . . ." He recalled his grandmother showing him a picture of his father and telling him that his father had been a heroic firefighter. Later, he learned that the photograph was from a detective magazine article about his father's murders and execution. Often told of his resemblance to his father, he came to believe that his father lived within him.

His mother was married four times and also had a series of short-term extramarital sexual partners. She frequently told her son that she had been raped by her father when she was nine. She ridiculed her son's bedwetting, which persisted to age 13, by calling him "pissy pants" in front of guests; he was also beaten for the bedwetting and for night terrors. For as long as he could recall he had had recurrent nightmares of being smothered by nylon similar to women's stockings and being strapped to a chair in a gas chamber as green gas filled the room. One of his stepfathers beat him relentlessly. For leaving a hammer outside, he was awakened by this stepfather burning his wrist with a cigar, which left a permanent scar. For playing a childish game while urinating, he was forced to drink urine. On the one occasion when his mother intervened, the stepfather pushed her head through a plaster wall. From then on she also actively abused her children from the earlier marriages.

Knocked unconscious on multiple occasions, he was once briefly comatose at age 16 and for over a week at approximately age 20. A computed tomography (CT) scan of the brain showed abnormally enlarged sulci and slightly enlarged ventricles. Results of the Halstead-Reitan Neuropsychological Battery and the Luria-Nebraska Neuropsychological Battery were interpreted as showing damage to the right frontal lobe.

As a juvenile, he had police contacts for vandalism, malicious acts, running away, and multiple burglaries (beginning at age seven in the company of an older brother). Apprehended for lewd contact with a 7-year-old girl at age 13, he was sent to reform school for a year. He was suspended from high school for misconduct and poor grades. At age 16, he was arrested for armed robbery, escaped, and later turned himself in to authorities.

At age 18, 2 weeks after the birth of his first child, he married the child's mother. Despite subsequent arrests for armed robbery, beating his wife, assault, burglary, auto theft, theft, parole violation, and other offenses, he was awarded custody of his daughter after divorcing his first wife. His second and third marriages ended in divorce after he beat his wives, and his fourth marriage ended in divorce for unknown reasons.

After many more arrests and a jail escape, he was eventually sentenced to prison on an armed robbery conviction. He initiated sexual contact with his seven-year-old daughter during a conjugal visit on the prison grounds. Prison records from his early 20s document a psychotic episode with paranoid delusions and suicidal ideation following the death of a brother. After he was paroled from prison he impregnated one woman and married another (his fifth wife). He separated from her after he was released from parole. His second through fifth wives appeared young enough to pass as teenagers.

In his early 30s, he lived as husband and wife with his 13-year-old daughter, whom he impregnated. The pregnancy was aborted. He continued to molest his daughter, who reported one of his rapes. He also sexually assaulted one of her girlfriends. He celebrated one of his birthdays by sodomizing his then 14-year-old daughter. Eventually she moved to her grandparents' home, and he began living and traveling with another woman, who became his sixth wife and his partner in a two-year series of rapes and murders.

His wife knew of his fantasies of torturing young girls and his desire for women he could control and abuse, and she assisted him in each of his known murders by selecting the victim, orchestrating the abduction, and concealing the evidence. He beat, tortured, and raped his victims, whom he forced to play the role of his daughter in fantasy scenarios that he directed. Available data suggest that he killed his victims to avoid detection and not because the killing gave him sexual pleasure.

His early victims were all teenage girls; his later victims included adults. After his initial murders, he again raped his daughter and her friend. They reported these offenses, and an arrest warrant was issued. The offender changed his identity, as he had on previous occasions, using falsified identification papers. A gun enthusiast, he bought and sold various firearms; shortly before his last arrest, he possessed two revolvers, an automatic pistol, a derringer, and a semiautomatic assault rifle. Those victim's bodies that have been located showed death by gunshot wounds or blows to the head. Some of the bodies were still bound.

Masturbation he regarded as shameful, dirty, and unmanly. The first sexually explicit pictures he could recall having seen were photographs of his mother with a man he did not recognize. Although familiar with sexually explicit men's magazines, he had never been to an adult book store or an X-rated movie "because I didn't want anybody to think I was in that category." He considered *The Exorcist* and *Psycho* influential in his life. In speaking of sexual deviations, he referred to "sadism-maschotism" [sic], but noted that this did not apply to him: ". . . sadism-masochism is where you like to be hurt while you hurt, and I don't think that's it. Maybe one half of it, cause I think I've been hurt enough." The imagery characteristic of bondage and domination pornography disgusted him: "That ain't me. . . . The ball in the mouth, the excess rope, I think what they've done is taken a fantasy and overdo it. The mask makes somebody look like out of Mars. . . . You're in a room and a girl walks out with a rubber suit or whip and she's subject to get shot." Asked about the covers of detective magazines, he responded by saying that they are what he really likes and that the interviewer seemed to read his mind, asking questions that allowed him to say what he was already thinking.

When he was 14, he learned that his fugitive father had been caught because his mother had told the police his whereabouts. After reporting this, he stated: "Sometimes I [think] about blowin' her head off. . . . Sometimes I wanta' put a shotgun in her mouth and blow the back of her head off . . ." For years, his favorite sexual fantasy was of torturing his mother to death:

> I was gonna' string her up by her feet, strip her, hang her up by her feet, spin her, take a razor blade, make little cuts, just little ones, watch the blood run out, just drip off her head. Hang her up in the closet, put airplane glue on her, light her up. Tattoo "bitch" on her forehead . . .

This fantasy gradually changed and came to include forced sexual activity and other forms of abuse and torture. After his first wife left him, she replaced his mother in the fantasy; eventually their daughter replaced her.

### *Case 3*

A 35-year-old, single, white man was charged with unarmed robbery. He had had several psychiatric hospitalizations, each time receiving a diagnosis of chronic undifferentiated schizophrenia. He was suspected to have committed the current act to gain readmission.

He left school after the ninth grade and never worked. He admitted to bouts of heavy alcohol consumption, but denied using other drugs. He had been arrested previously for threatening the President, attempted strong-arm robbery, and attempted bank robbery. He admitted several indecent exposures and burglaries for which he had not been arrested. During the burglaries he had taken food and woman's underclothing, searched bureau drawers, and torn up clothes. He also admitted to "peeping" and several episodes of crossdressing, donning panties, slips, dresses, and lipstick. On several occasions he had entered houses when the occupants were away and left notes threatening to kill them if they did not leave things for him to take. He denied urinating or defecating in these houses, although he had once thrown a litter box containing cat feces. He had also once tried to steal explosives.

At age ten he had engaged in sexual play with his sister and a niece; there had been at least one episode of intercourse. After he quit school at age 16, he lived briefly with a 14-year-old girl who became pregnant and miscarried. At some point thereafter he began having fantasies of forced vaginal intercourse, sucking and biting on breasts, and mutual oral sexual activity. He described subsequent enchantment with pornography depicting these activities and dated his first contact with detective magazines to approximately the same time.

By his mid-20s, his masturbatory fantasies were of lying on a woman, tying her with heavy, electrical wire, having intercourse with her, killing her by blows and strangulation, and then attacking her genitalia. He said that the detective magazines had not caused these fantasies, adding, "I had 'em before but the [detective] magazines bring them out." By his late 20s, he was having fantasies of mutilation, smearing and drinking blood, and continuing intercourse after his victim's death. He also had recurrent dreams of being a "bloodthirsty murderer."

He stated that he preferred masturbating while looking at the covers and contents of detective magazines. He regarded detective magazine photographs as the best match to his current sexual fantasies and as his most important source of sexual pleasure. He said he masturbated in his bathroom with detective magazine covers and pictures from explicitly erotic magazines so positioned that he could see himself and the pictures in a mirror. He particularly liked pictures in which women "look like whores," and he masturbated to orgasm while fantasizing about "killing whores."

He claimed never to have acted out his most extreme fantasies, but he believed that he might be "losing control over them." He admitted to having had intense "sexual thoughts" during the unarmed robbery, to "enjoying touching, feeling panties and bras," and to excitement at thoughts of women struggling.

A detailed review of his records uncovered no documentation of symptoms or signs of schizophrenia. He admitted to having feigned mental illness so that he could be stopped from acting out his fantasies.

### *Case 4*

A 20-year-old, single, black man with no previous criminal record but several psychiatric evaluations was incarcerated for sexually molesting children. At least three complaints had been lodged previously against him without formal charges being filed.

He stood charged with two sexual assaults against prepubescent girls. In the first incident he asked a girl to go with him, claiming that a friend wanted to speak with her. He grabbed the girl, pulled her pants down, and fondled her genitals until someone appeared, when he fled. The second incident was similar, although reportedly more forceful, with the victim resisting more aggressively. He fled when the victim bit him. He denied any sexual contact with his victims, but did say that in one offense against a girl he "kept hitting until she was unconscious; I thought she was dead."

His father had been rarely present, and the family was on welfare. One of his brothers was said to be mentally retarded and institutionalized. He claimed to have had good relationships with family members and to have had friends. He completed ninth grade with below average grades; the school authorities had wanted him placed in special education classes, but his mother had refused. He was never married, had no military history, and worked intermittently in unskilled jobs. He acknowledged moderate use of alcohol and marijuana, but denied using other drugs.

During the screening psychiatric interview he denied any symptoms suggestive of a psychotic illness. He claimed his present offenses occurred because he was "too scared to ask out women." Fearing that older women might reject him and tell him he was "too young, just a kid, and I can't handle that," he felt anger toward older women, "like I want to kill them." He admitted to daydreams about "beating them up" followed by intercourse. His masturbatory fantasies involved bondage in which the hands of the women were tied behind their backs, their mouths gagged, and their legs tied to bedposts. He denied masturbatory fantasies involving other physical injury. He also denied crossdressing. He believed he would never act on his masturbatory fantasies: "I just couldn't see myself doing something like that; not if she don't do as I tell her. If I get mad I start tearing up stuff, but not kids; I like kids. If I had kids I wouldn't want someone doing that to them." He claimed his fantasies involved "mostly white girls" ages 12 to 13.

He said that he frequently used visual media to stimulate his masturbatory fantasies. His favorite images involved women wearing undergarments, such as brassieres and panties, or two-piece bathing suits, which he commonly found on detective magazine covers, but added that he found detective magazines less appealing than traditional pornography.

### *Case 5*

A 34-year-old, white woman received a telephone call from a man claiming to represent a manufacturing firm that had developed a new line of brassieres and was conducting a marketing survey in her area. She was invited to participate in the survey. She would be sent six free bras to wear for six months, when she would be asked to complete a questionnaire as to their comfort, durability, and washability. She agreed and provided her bust measurements to the caller.

Approximately seven months later, the same man called the second time and said that he would like to deliver the bras to her home. She asked that he call back in a few days as she wanted to discuss the matter with her husband. When he rang, she told him that she had decided not to participate in the survey. He responded, "I don't want to have intercourse with you, I just want to deliver the bras." She hung up immediately.

Five months later, upon receiving a package in the mail which contained four sketches depicting her bound, in various stages of undress, she notified the police. Shortly thereafter, the man called again, asking for her opinion of the sketches.

A second package containing four sketches similar to the first ones arrived about four months later, again followed by a telephone call. During this conversation, the man requested that she meet him and said he would call again to arrange the meeting. He also described the wallpaper pattern in her bathroom. He used no profanity in the telephone conversations.

Approximately four months later he called for the sixth time, requesting a meeting. She hung up on him. Within days came another call during which she agreed to meet him at a shopping center near her home. She notified the police, who arranged surveillance. After waiting in vain for 45 min at the appointed location, she talked with the surveilling officers and drove home.

The following month, the man called and accurately described her movements at the rendezvous and her return home. He requested that she deliver two of her bras to a designated Salvation Army clothes bin. Again she notified the police and a surveillance of the drop site was arranged; however, the offender was able to pick up the bras undetected by entering the clothes bin from an opening in the rear. Shortly thereafter, she received a third package containing her bras, two pictorial pages, an advertisement page, and a cover from a detective magazine. The bras had semen stains and handwriting on them. The magazine cover and the pictorial pages each showed a woman being threatened by a man holding a knife; her name was written above the women and the word "me" was written above the men. The advertisement was for Nazi paraphernalia. One month later he rang to ask what she thought about the package.

That same month, she received a letter containing polaroid photographs of a white male, nude except for a ski mask, masturbating in a hotel room. The letter said that he had rented the room, intended to kidnap her, and had bought rope with which to bind her and a camera with which to take pictures of her performing various sexual acts. He called her again shortly after she received the letter. The eleventh and final call came one month later.

From the photographs the police were able to identify the hotel, where they found that he had registered under his real name. He was later arrested, convicted, and sentenced to one year in jail. At the time of his arrest, the police seized a folder containing 30 detective magazine covers that depicted women in potentially lethal situations.

### *Case 6*

A 30-year-old white man was discovered dead in his apartment. He was partially suspended in a doorway by a length of plastic clothesline which encircled his neck twice with a knot on the right. The clothesline went up to and through an airspace above the door and was affixed to a hinge beside the victim. His arms hung at his sides, and his feet touched the floor. A pair of wire cutters and more clothesline were found on a washing machine in the apartment. He wore eyeglasses, a brassiere, jockey shorts, and black calf-length socks.

Propped up on a stand directly in front of him was a detective magazine cover which depicted a man strangling a young woman who wore a black brassiere. Two lingerie advertisements taped to a nearby wall showed a woman from the waist up who wore only a brassiere and a woman wearing a brassiere and a panty girdle. A nearby phonograph was on, and the first song on the record was "Barbie Ann." An album cover lying beside the phonograph had a picture of a man with two young women wearing halter tops.

The decedent's wife, Barbara, had been separated from him for four months; she and their only child had moved to another state. He had appeared to be in normal spirits during a visit with his parents six days earlier. A friend with whom he had played pool on the evening before his death and who was the last person to see him alive described him as having been in good spirits at the time of their parting.

The death was ruled to be an accident occurring during autoerotic activity. The decedent's attire and visual props suggest a brassiere fetish, while the detective magazine cover in front of him depicting the sexual murder of a woman wearing a brassiere suggests that he entertained a sadistic fantasy that he had been enacting with his own body. The object of his fantasies may have been his wife. (This case has been reported in less detail elsewhere [*20*].)

## Discussion

Detective magazines juxtapose conventionally erotic images (for example, pictures of scantily clad women or descriptions of sexual acts) with images of violence and suffering. Detective magazines are not the only source for this combination of images; many recent horror films, crime films, and rock video productions have similar characteristics. One study found that bondage and domination was the primary theme of 17% of the magazines sold in "adults only" bookstores [*21*]. Unlike these magazines, however, detective magazines, being inexpensive and available on many newsstands, have a large circulation. They are always openly displayed, unlike magazines showing nonviolent nudity, and there is no effort to discourage sales to minors.

The cases reported in this paper show that some readers who use detective magazines as sources of sexual fantasy material also act on their fantasies. MacCulloch et al [*22*] have described men who progress from sadistic masturbation fantasies to crimes that enact portions of the fantasy sequence, and the [illegible] to more serious offenses based on an elaborated fantasy sequence. A similar pattern can be recognized in Cases 3 and 4 above.

At least two previously published case reports mention the use of detective magazines as a source of sexual fantasy imagery. Graber et al [*23*] reported the history of a 36-year-old man who forced a woman to fellate him at knife-point in a women's restroom of a public park. This attack was followed several weeks later by "an abortive attack on a woman that ended when she was cut by his knife." The offender had no prior criminal record. He reported a lack of sexual experience, including masturbation, until marriage at age 23. The frequency of intercourse with his wife decreased after he experienced a business failure. About a year before his arrest he had begun masturbating while reading the sex crime articles in a detective magazine, which thereafter became his preferred sexual outlet. The offense for which he was arrested was inspired by a detective magazine article.

Wesselius and Bally [*24*] recorded the history of a 24-year-old man who practiced autoerotic asphyxia by self-hanging for ten years. He first masturbated at age ten while suspended from the bar of a swing set. He began using the pictures in *True Detective* magazine while masturbating around age 14. The authors report: "From this magazine he developed the idea of dressing in female clothing which he would take from the family laundry hamper. . . ." Within months, he became sexually aroused while watching a hanging scene in a cowboy film, and was particularly excited by the man's struggle and kicking feet. He then began masturbating while hanging himself. The authors noted that "[h]e continued to use *True Detective* magazines with only occasional use of other more common soft pornography publications." He would become most aroused by dressing in soiled women's undergarments and hanging himself. He also became aroused by wearing such clothing and binding his limbs and neck. He fantasized strangling a woman and was particularly aroused by imagining her helpless struggling and her kicking feet.

Goldstein and Kant [*25*] quoted a rapist as saying:

> I can remember looking through *True Detective* and stuff like this and seeing articles about women that had been murdered or something. . . . I remember partially nude bodies. There was a lot of magazines on the stands I used to buy all the time, these horror stories, "trips of terror," weird stories, stuff like this. Soon after this, they banned 'em from the newsstands. I used to like to read them all the time.

While there is no doubt that detective magazines provide a rich source of sexually sadistic imagery, the role that these magazines play in the development of sexual sadism, if any, is unknown. To the extent that paraphilic responsiveness is acquired by repeatedly associating sexual arousal with particular images, the availability of sexually sadistic imagery may be important. Detective magazines are one source of such imagery.

The cases we have described do not prove that detective magazines "cause" sexual sadism or sadistic offenses. Only unethical experiments could prove or disprove such causation, and we do not encourage that they be contemplated. Tests of the arousal of normal men and of sexual sadists to the cover imagery we describe could, however, tend to support or refute our postulate and could be conducted in an ethical manner that minimizes the risk of harming the subjects.

We assume that conventionally erotic elements in detective magazines would arouse many males and that responsiveness to particular stimuli can be learned. We postulate that repeated pairing of arousal with the unconditioned stimuli in these magazines, such as depictions of bondage, domination, weapons, strangulation and other struggles, blood, and corpses increases the probability that the viewer will subsequently be aroused by exposure to these stimuli, whether or not they are presented in an erotic context.

We know that some boys and men repeatedly use detective magazines to achieve sexual arousal and that at least some of these individuals are sexual sadists. Of these latter, however, we do not know what proportion were sexual sadists before their exposure to detective magazines. We consider it plausible that some boys and young men turn to detective magazines for such conventional sexual imagery as scantily clad women or descriptions of sexual interaction, and through repeated exposure learn to be aroused by elements of the photographs and articles that otherwise would have had no sexual associations. We recognize, however, that horror movies and other films probably expose more boys and young men to the pairing of erotic and violent images.

Detective magazines might affect the established sexual sadist by reinforcing his paraphilia (particularly if he masturbates to orgasm while looking at or reading the magazines), by adding details to his fantasies and preferred imagery, and by providing consensual validation that lessens the extent to which he considers his preference abnormal or unacceptable.

Beyond their significance with respect to sexual sadism, detective magazines have other potentially criminogenic effects. None of these potential effects is unique to detective magazines, but each should be considered in assessing the social value of these magazines.

Detective magazines publicize particularly serious crimes. In an era in which many value fame more highly than esteem or freedom, the prospect of publicity serves as an inducement to crime. While detective magazines reach a smaller audience than network television, national news magazines, wire services, or the most widely read newspapers, they reach an audience with greater than average interest in crime, provide lengthier and more detailed accounts of particular offenders and offenses, and emphasize the degree of publicity received by the offender.

Detective magazines are an unsurpassed source of public information on techniques for committing crimes, on the errors of unsuccessful offenders, and on the methods available to law enforcement agencies for preventing crimes and apprehending offenders. We have examined and studied offenders who have sought out, filed, and used such information to commit crimes, but we also know law enforcement officers who use such information as a source of continuing education.

The advertisements in detective magazines provide access to information and paraphernalia that are sometimes used to commit crimes, including weapons, burglary tools, and car theft equipment. Police badges and other false identification obtained through these advertisements have been used by offenders to gain entry to dwellings or to stop motorists. Cases have been documented of persons murdered or otherwise victimized by persons whom they met through lonely hearts advertisements such as those appearing in detective magazines [*26*].

## Conclusions

Detective magazines have a lengthy heritage and generate substantial sales. No doubt some readers examine detective magazines out of curiosity or casual interest. Sexual sadists, however, are particularly drawn to detective magazines, and some of these individuals translate their fantasies into action. Clinicians should learn to ask their patients about reading preferences and should also have sufficient knowledge of popular publications to be able to interpret the responses. Since few patients spontaneously mention sadistic sexual fantasies in the course of assessment or psychotherapy, inquiries about reading habits provide an important route through which to explore a patient's fantasy life.

Patients with a particular interest in detective magazines may have problems other than sexual sadism. In our experience, many individuals who are paranoid or preoccupied with violence read or collect detective magazines, mercenary magazines (such as *Soldier of Fortune*, *Commando*, and *Gung Ho*), and hunting and gun magazines. Peterson [*27*] noted that "the market of a medium [usually] coincides with that of its advertisements" and that advertisements generally reflect consumer needs and desires. Some of the advertisements in detective magazines cater to those with pronounced feelings of inadequacy by offering greater sexual control, appeal, or function; techniques of mind control; and certification of identity.

Our view that the harmful effects of detective magazines probably outweigh whatever contributions they may make to law enforcement, entertainment, and the economy is, of course, not entirely original. Writing at the end of the 19th century, Cesare Lombroso considered newspaper reports of crime the source of many imitative ("copycat") crimes, of which he gave multiple examples. He concluded:

> This morbid stimulation is increased a hundred-fold by the prodigious increase of really criminal newspapers, which spread abroad the virus of the most loathsome social plagues, simply for sordid gain, and excite the morbid appetite and still more morbid curiosity of the lower social classes. They may be likened to those maggots which, sprung from putrefaction, increase it by their presence [28].

We suppose that Lombroso put it too strongly, as was his custom. Nonetheless, we are concerned that detective magazines—today's equivalent of "really criminal newspapers"—may contribute to the development and persistence of sexual sadism; facilitate sadistic fantasies; and encourage crime by rewarding it with publicity, disseminating technical information, and easing access to criminal equipment.

We therefore urge policymakers to consider detective magazines in their deliberations concerning violence in the media and pornography. We recommend that the new national commission on pornography [29] include detective magazines and other sources of sexually sadistic imagery among the classes of materials that it studies. Whatever definition of pornography or obscenity emerges from the ongoing public policy debate should surely be formulated to encompass those materials that present the greatest risk of promoting the erotization of violence.

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## Personal Comments by Commissioner James Dobson

Now that the work of the Attorney General's Commission on Pornography has come to an end, I look back on this fourteen month project as one of the most difficult . . . and gratifying . . . responsibilities of my life. On the down side, the task of sifting through huge volumes of offensive and legally obscene materials has not been a pleasant experience. Under other circumstances one would not willingly devote a year of his life to depictions of rape, incest, masturbation, mutilation, defecation, urination, child molestation and sadomasochistic activity. Nor have the lengthy and difficult deliberations in Commission meetings been without stress. But on the other hand, there is a distinct satisfaction in knowing that we gave ourselves unreservedly to this governmental assignment and, I believe, served our country well.

I now understand how mountain climbers must feel when they finally stand atop the highest peak. They overcome insurmountable obstacles to reach the rim of the world and announce proudly to one another, "we made it!" In a similar context, I feel a sense of accomplishment as the Commission releases its final report to the President, the Attorney General and the people. For a brief moment in Scottsdale last month, it appeared that our differing philosophies would strand us on the lower slopes. And of course, we were monitored daily by the ACLU the pornographers and the press, who huddled together and murmured with one voice, "they are doomed!" But now as we sign the final document and fling it about to the public, it does not seem pretentious to indulge ourselves in the satisfaction of having accomplished our goals. By George, I think we made it!

Let me indicate now, from the viewpoint of this one Commissioner, what the final report *is* and *is not*. First, it is not the work of a biased Commission which merely rubber stamped the conservative agenda of the Reagan administration. A quick analysis of our proceedings will reveal the painstaking process by which our conclusions were reached. If the deck were stacked, as some have suggested, we would not have invested such long, arduous hours in debate and compromise. Serving on the Commission were three attorneys, two psychologists, one psychiatrist, one social worker, one city council member, one Catholic priest, one federal judge and one magazine editor. Some were Christians, some Jewish, and some atheists. Some were Democrats and some Republicans. All were independent, conscientious citizens who took their responsibility very seriously. Our diversity was also evident on strategic issues about which society itself is divided. Our voting on these more troublesome matters often split 6-5, being decided by a swing member or two. Some whitewash! So the characterization of this seven man, four woman panel as an ultraconservative hit squad is simply poppycock. Read the transcripts. You will see.

Second, the final report does not do violence to the First Amendment to the Constitution. The *Miller* standard, by which the Supreme Court clearly reaffirmed the illegality of obscene matter in 1973, was not assaulted during any of our deliberations. No suggestion was made that the Court had been too lenient . . . or that a Constitutional Amendment should lower the threshold of obscenity . . . or that the Justices should reconsider their position. No. The Miller standard was accepted and even defended as the law of the land. What was recommended, to the consternation of pornographers, was that government should begin enforcing the obscenity laws that are already on the books . . . criminal laws that have stood constitutional muster! Considering the unwillingness of our elected representatives to deal with this issue, that would be novel, indeed.

Third, the hearings on which this report was based were not manipulated to produce an anti-pornography slant. Every qualified libertarian and First Amendment advocate properly requesting the right to testify was granted a place on the agenda, limited only by the constraints of time. A few individuals and organizations on both sides of the issue were unable to testify because the demand far exceeded available opportunities. However, objective procedures were established to deal fairly with those wishing to be heard, and complaints alleging bias were, I believe, unfounded. In fact, several organizations were asked to speak on behalf of sexually explicit materials but either declined or failed to appear. It is true that more witnesses testified against pornography than those who favored it, but that was a function of the disproportionate requests that were received by the executive director. Furthermore, I think it also reflects a disproportionate number of American citizens who oppose the proliferation of obscenity.

Looking now at the other side of the coin, let me express what the final report is and what I believe its impact is likely to be. First, the Commission expressed an unmistakable condemnation of sexually explicit material that is violent in nature. We were unanimous in that position throughout our deliberations. There is no place in this culture for material deemed legally obscene by the courts which depicts the dismemberment, burning, whipping, hanging, torturing or raping of women. The time has come to eradicate such materials and prosecute those who produce it. There was no disagreement on that point.

Second, we were also unanimous in our condemnation of sexually explicit materials which depict women in situations that are humiliating, demeaning and subjugating. I can still recall photographs of nude young women being penetrated by broom handles, smeared with feces, urinated upon, covered in blood or kneeling submissively in the act of fellatio. Most American citizens have no idea that such gruesome scenes are common in the world of obscene publications today. When asked to describe pornography currently on the market, they think in terms of airbrushed centerfolds in the popular "men's magazines." But steady customers of pornography have long since grown tired of simple heterosexual nudity. Indeed, a visit to an adult bookstore quickly reveals the absence of so-called "normal" sexuality.

The offerings today feature beribboned 18 to 20 year old women whose genitalia have been shaved to make them look like little girls, and men giving enemas or whippings to one another, and metal bars to hold a woman's legs apart, and 3 foot rubber penises and photographs of women sipping ejaculate from champagne glasses. In one shop which our staff visited on Times Square, there were 46 films for sale which depicted women having intercourse or performing oral sex with different animals . . . pigs, dogs, donkeys and horses. This is the world of pornography today, and I believe the public would rise up in wrath to condemn it if they knew of its prominence.

Finally, our Commission was unanimously opposed to child pornography in any form. Though categorically illegal since 1983, a thriving cottage industry still exists in this country. Fathers, step-fathers, uncles, teachers and neighbors find ways to secure photographs of the children in their care. They then sell or trade the pictures to fellow pedophiles. I will never forget a particular set of photographs shown to us at our first hearing in Washington, D.C. It focused on a cute, nine year old boy who had fallen into the hands of a molester. In the first picture, the blond lad was fully clothed and smiling at the camera. But in the second, he was nude, dead and had a butcher knife protruding from his chest. I served for 14 years as a member of a medical school faculty and thought I had seen it all. But my knees buckled and tears came to my eyes as these and hundreds of other photographs of children were presented . . .

showing pitiful boys and girls with their rectums enlarged to accommodate adult males and their vaginas penetrated with pencils, toothbrushes and guns. Perhaps the reader can understand my anger and disbelief when a representative for the American Civil Liberties Union testified a few minutes later. He advocated the free exchange of pornography, all pornography, in the marketplace. He was promptly asked about material depicting children such as those we had seen. This man said, with a straight face, that it is the ACLU's position that child pornography should not be produced, but once it is in existence, there should be no restriction on its sale and distribution. In other words, the photographic record of a child's molestation and abuse should be a legal source of profit for those who wish to reproduce, sell, print and distribute it for the world to see. And that, he said, was the intent of the First Amendment to the Constitution!

Speaking personally, I now passionately support the control of sexually explicit material that is legally obscene, whether it relates to children or adults. Though the Commission has dealt at some length in its report with specific "harms" associated with pornography, I would like to list the dangers here from my own point of view. Our critics have alleged that the Commission wishes to usher in a new era of sexual repression . . . that we favor governmental interference in America's bedrooms and even in our thoughts. That is nonsense. On the other hand, I have seen enough evidence in the past year to convince me of the devastation inflicted on victims of pornography. It is on their behalf that we must intervene. Here, then, are the harms as I perceive them.

(1) Depictions of violence against women are related to violence against women everywhere. Though social research on this subject has been difficult to conduct, the totality of evidence supports the linkage between illustration and imitation. Furthermore, pornography perpetrates the so-called "rape myth" whereby women are consistently depicted as wanting to be assaulted even when they deny it. They are shown as terrified victims in the beginnings of rape scenes, but conclude by begging for more. Men who want to believe that women crave violent sex can find plenty of pornographic evidence to support their predilections.

(2) For a certain percentage of men, the use of pornographic material is addictive and progressive. Like the addiction to drugs, alcohol or food, those who are hooked on sex become obsessed by their need. It fills their world, night and day. And too often, their families are destroyed in the process.

3) Pornography is degrading to women. How could any of us, having heard Andrea Dworkin's moving testimony, turn a deaf ear to her protest? The pornographic depictions she described are an affront to an entire gender, and I would take that case to any jury in the

land. Remember that men are the purchasers of pornography. Many witnesses testified that women are typically repulsed by visual depictions of the type therein described. It is provided primarily for the lustful pleasure of men and boys who use it to generate excitation. And it is my belief, though evidence is not easily obtained, that a small but dangerous minority will then choose to act aggressively against the nearest available females. Pornography is the theory; rape is the practice.

(4) It appears extremely naive to assume that the river of obscenity which has inundated the American landscape has not invaded the world of children. This seven billion dollar industry pervades every dimension of our lives. There are more stores selling pornographic videos than there are McDonald hamburger stands. More than 800,000 phone calls are made each day to dial-a-porn companies in New York (180,000,000 in 1984), many placed by boys and girls still in elementary school. Furthermore, recent clinical observations by Dr. Victor Cline and others have indicated that a growing number of children are finding their parents' sexually explicit videos and magazines, and are experimenting with what they have learned on

younger children. The problem is spreading rapidly. Obviously, obscenity cannot be permitted to flow freely through the veins of society without reaching the eyes and ears of our children. Latchkey kids by the millions are watching porn on Cable TV and reading their parents' adult magazines. For 50 cents, they can purchase their own pornographic tabloids from vendor machines on the street. Or they can hear shocking vulgarities for free on their heavy metal radio stations. At an age when elementary school children should be reading Tom Sawyer and viewing traditional entertainment in the spirit of Walt Disney, they are learning perverted facts which neither their minds nor bodies are equipped to handle. It is my belief, accordingly, that the behavior of an entire generation of teenagers is being adversely affected by the current emphasis on premarital sexuality and general eroticism seen nightly on television, in the movies, and in the other sources of pornography I have mentioned. It is not surprising that the incidence of unwed pregnancy and abortions has skyrocketed since 1970. Teens are merely doing what they've been taught that they should get into bed, early and often. And to a large degree, pornography has done this to them.

(5) Organized crime controls more than 85 percent of all

commercially produced pornography in Americ
and distribution of these materials pro
profits for the crime lords who also sell i
to our kids and engage in murder, fraud,
every vice known to man. Are we to conclu
that the 7 billion (or more) tax-free dolla
receive each year from the pornography ind
harmful to society? Is malignant melanoma
the human body?

(6) Pornography is often used by pedophile
children's defenses against sexual exploit
are shown nude pictures of adults, for exam
told, "See. This is what mommies and d
They are then stripped of innocence and
brutalities that they will remember for a l

(7) Outlets for obscenity are magnets for
crimes. When a thriving adult bookstore
neighborhood, an array of "support-service
develops around it. Prostitution, narcoti
crime proliferate. From this perspec
interesting that law enforcement officials
they do not investigate or attempt to cont
of obscenity because they lack the resourc
it. In reality, their resources will exter
they first enforce the laws relating to
The consequent reduction in crime makes

effective use of taxpayers' funds.

The City of Cincinnati, Ohio has demonstrated how a community can rid itself of obscenity without inordinate expenditures of personnel and money.

(8) So-called adult bookstores are often centers of disease and homosexual activity. Again, the average citizen is not aware that the primary source of revenue in adult bookstores is derived from video and film booths. Patrons enter these 3 by 3 foot cubicles and deposit a coin in the slot. They are then treated to about 90 seconds of a pornographic movie. If they want to see more, they must continue to pump coins (usually quarters) in the machine. The booths I witnessed on New York's Times Square were even more graphic. Upon depositing the coin, a screen was raised, revealing two or more women and men who performed live sex acts upon one another on a small stage. Everything that is possible for heterosexuals, homosexuals or lesbians to do was demonstrated a few feet from the viewers. The booths from which these videos or live performers are viewed become filthy beyond description as the day progresses. Police investigators testified before our Commission that the stench is unbearable and that the floor becomes sticky with semen, urine and saliva. Holes in the walls between the booths are often provided to permit male homosexuals to service

one another. Given the current concern o
transmitted diseases and especially Acqu
Deficiency Syndrome (AIDS), it is incr
health departments have not attempted to r
such businesses. States that will not allo
owners or hairdressers or counselors or ac
to operate without licenses have perm
wretched cesspools to escape governmental s
every public health officer in the country
"Why?"

(9) Finally, pornography is a source of signif
the institution of the family and to socie
Can anything which devastates vulner
children, as we have seen, be considered
the parents who produced them? Rai
children is the primary occupation of f
anything which invades the childhoods and
the minds of boys and girls must be seen
to the mothers and fathers who gave
Furthermore, what is at stake here is the
family itself. We are sexual creatu
physical attraction between males and fem
the basis for every dimension of m
parenthood. Thus, anything that interjec
that relationship must be embraced with
Until we know that pornography is not

> progressive . . . until we are *certain* that the passion of fantasy does not destroy the passion of reality . . . until we are *sure* that obsessive use of obscene materials will not lead to perversions and conflict between husbands and wives . . . then we dare not adorn them with the crown of respectability. Society has an absolute obligation to protect itself from material which crosses the line established objectively by its legislators and court system. That is not sexual repression. That is self-preservation.

If not limited by time and space, I could describe dozens of other harms associated with exposure to pornography. Presumably, members of Congress were also cognizant of these dangers when they drafted legislation to control sexually explicit material. The President and his predecessors would not have signed those bills into criminal laws if they had not agreed. The Supreme Court must have shared the same concerns when it ruled that obscenity is not protected by the First Amendment---reaffirming the validity and constitutionality of current laws. How can it be, then, that these carefully crafted laws are not being enforced? Good question! The refusal of federal and local officials to check the rising tide of obscenity is a disgrace and an outrage. It is said that the production and distribution of pornography is the only unregulated industry remaining today . . . the last vestige of "free enterprise" in America. Indeed, the salient finding emerging from 12 months of testimony before our Commission reflected this utter paralysis of government in response to the pornographic plague. As citizens of a democratic society, we have surrendered our right to protect ourselves in return for protection by the State. Thus, our governmental representatives have a constitutional mandate to shield us from harm and criminal activity . . . including that associated with obscenity. It is time that our leaders were held accountable for their obvious malfeasance. Attorney General Meese, who has courageously supported other unpopular causes, has been reluctant to tackle this one. He is reportedly awaiting the final report from the Commission before mobilizing the Department of Justice. We will see what happens now. But his predecessors have no such excuse for their dismal record. Under Attorney General William French Smith, there was not a single indictment brought against producers of adult pornography in 1983. None! There were only six in 1982, but four of those were advanced by one motivated prosecutor. In 1981 there were two. Of the 93 United States Attorneys, only seven have devoted any effort to the prosecution of obscenity. Obviously, the multi-billion dollar porn industry is under no serious pressure from federal prosecutors. Considering this apathy, perhaps it is not surprising that the Department of Justice greeted our Commission with something less than rampant enthusiasm. For example, the first Presidential Commission received two million dollars (in 1967 money) and was granted two years to complete their assignment. Our Commission was allocated only $500,000 (in 1985 money) and was given one year in which to study an industry that had expanded exponentially. Repeated requests for adequate time and funding were summarily denied. Considering the Presidential mandate to establish the Commission, the Department had no choice but to execute the order. But it did very little to guarantee its success or assist with the enormous workload. Quite frankly, failure would have been inevitable were it not for the dedication of eleven determined Commissioners who worked under extreme pressure and without compensation to finish the task. We were also blessed with a marvelous staff and executive director who were committed to the challenge. Other branches of government must also be held accountable for their unwillingness to enforce the criminal laws. The United States Postal Service makes virtually no effort to prosecute those who send obscene material through the mail. Attorney Paul McGeady testified that there are conservatively 100,000 violations of 18 USC 1461 every day of the year. Likewise, the Federal Communications Commission and Interstate Commerce Commission do not attempt to regulate the interstate transportation of obscene material. Eighty percent of all pornography is produced in Los Angeles County and then shipped to the rest of the country. It would not be difficult to identify and prosecute those who transport it across state lines. The Federal Communications Commission does not regulate obscenity on cable or satellite television. The Customs Service makes no effort to prevent adult pornography from entering this country, and catches only five percent of child porn sent from abroad. The Internal Revenue Service permits organized crime to avoid taxes on the majority of its retail sales, especially the video booth market. The Federal Bureau of Investigation assigns only two of 8700 special agents to obscenity investigation, even though organized crime controls the industry. And on and on it goes.

Local law enforcement agencies are equally unconcerned about obscenity. The City of Miami has assigned only two of 1,500 policemen to this area, neither of which is given a car. Chicago allocates two of 12,000 officers to obscenity control. Los Angeles assigns 8 out of 6,700, even though Los Angeles is the porn capital of the country. Very few indictments have been brought against a pornographer in Los Angeles County in more than ten years, despite the glut of materials produced there. Another serious concern is also directed at the court system and the judges who have winked at pornography. Even when rare convictions have been obtained, the penalties assessed have been pitiful! Producers of illegal materials may earn millions in profit each year, and yet serve no time in prison and pay fines of perhaps $100. One powerful entrepreneur in Miami was convicted on obscenity charges for the 61st time, yet received a fine of only $1600. The judge in another case refused to even look at child pornography which the defendant had supposedly produced. He said it would prejudice him to examine the material. That judge had never sentenced a single convicted pornographer to a day in prison. Is there any wonder why America is inundated in sexually explicit material today? So we come to the bottom line. We've looked at the conditions that have led to the present situation. Now we must consider the mid-course maneuvers that will correct it. I believe the suggestions offered in the Commissioner's final report, herein, will provide an effective guide toward that end. We have not merely attempted to assess the problem; we have offered a proposed resolution. The testimony on which it is based make it clear that we are engaged in a winnable war! America could rid itself of hard core pornography in 18 months if the recommendations offered in the following report are implemented. We have provided a road-map for fine tuning federal and state legislation and for the mobilization of law enforcement efforts around the country. Accordingly, it is my hope that the effort we invested will provide the basis for a new public policy. But that will occur only if American citizens demand action from their government. Nothing short of a public outcry will motivate our slumbering representatives to defend community standards of decency. It is that public statement that the pornographers fear most, and for very good reason. The people possess the power in this wonderful democracy to override apathetic judges, disinterested police chiefs, unmotivated U.S. Attorneys, and unwilling federal officials. I pray that they will do so. If they do not, then we have labored in vain. If wisdom more often than not results from the simultaneou practice of several key virtues--among which must surely b numbered prudence, justice, temperance and fortitude--then th eleven members of the Attorney General's Commission o Pornography were no more likely or qualified than any othe group of eleven Americans to undertake the study of this mos complex and divisive subject.

## Statement of Father Bruce Ritter

Eleven Solomons we are not!

Eleven Americans, not Solomons therefore, sat down together over the course of a year to listen and to learn, to argue and to debate. At the end we are able to present this modest report of our conclusions to the American people--a report in which, on most key issues, we were able to achieve virtual or at least substantial unanimity.

We are proud of the result. Or to speak for myself and not the Commission--the purpose of this "personal statement"--I am proud of the result and quite proud that I had this opportunity to serve with my fellow citizens on this Commission.

That we could not agree on all issues is hardly surprising. Indeed that kind of total unanimity is simply not to be found in the real world of a culturally and religiously pluralistic society and it would be dangerously disingenuous to criticize the Commission for memorializing in this Report its differences of perception, of logic, of background, of personal conviction.

At bottom, the creation of this Commission was an inescapably political act--we are, after all, a government body, convened to give advice to the government of the United States, and specifically, to the Justice Department.

More important still, we have been asked to put our eminently fallible judgments at the service of the American people, who are the final arbiters of political power. Our every word, in every hearing and meeting, has been subje to--and has received-- rigorous public scrutiny, and may be us and misused in future political debates.

It would be an egregiously self-serving mistake howeve to assume that the work of this Commission was therefo dominated by political considerations. I think it fair to sta that we attempted, as best we could, within the short life sp of this Commission, to reach our conclusions based on a dilige and serious study of the evidence brought before us.

In the final analysis, however, every thinking adult is walking-around collection of a priori assumptions that influen his thinking on all serious issues. These assumptions, in pa the product of education and life experience, in part t rigorous conclusions of reason and logic, are, on balance, t "givens" each of us bring to every debate, to every effort find the truth of a particular matter. These "givens" a tested, challenged, refined and sometimes repudiated in t elastic give and take of serious argument. Eleve Commissioners, perforce, brought such assumptions a convictions to our deliberations. It is my hope that we we able to transcend the limitations necessarily intrinsic to a personal view of the world and human behavior--and for tha matter, to transcend the limits of any supposed allegiance t the political and religious ideologies of the Right or Left.

Given the severe time and budgetary constraints unde which the Commission labored we were neither able, nor should w have been expected, to treat all aspects of our charge with that degree of thoroughness many readers of this Report might have desired. Nor is it possible within the limits of this necessarily brief personal reflection on the work of the Commission to do more than touch upon those areas of more personal concern or those issues where my decision to vote one way rather than another might require some elaboration, viz. the absolutely central debate over Category III materials, the Printed Word controversy, the very thorny issue of the Indecency Standard for cable television--and the hugely controversial and largely shunned as too-hot-to-handle subject of sex education for our children.

The Category III Debate.

I think the Commission was quite correct in its general approach to our study of pornography, not only by refusing to establish hasty a priori definitions of what pornography was or was not, but also in attempting some delineation and distinction of the various categories of the sexually explicit materials examined by us. The rationale for this approach is, I think, stated quite lucidly and cogently in this Report. That is not to say that other approaches might not have been equally fruitful or to say that there were no serious limitations to this approach. I shall discuss below what I consider the major and perhaps in retrospect, a significantly unacknowledged and even crippling flaw, of this methodology.

Nonetheless, this particular approach greatly facilitated

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our difficult and time-consuming discussions of the real or potential "harms" ascribed to pornography and the identification of these harms with the various categories of sexually explicit materials. In addition, our chosen approach enabled the Commission to understand better the various kinds of evidence or "proof" needed to draw reasonable conclusions about the kinds of harms "caused" by pornography.

As Commissioners, therefore, based on the evidence presented to us, we had little difficulty reaching the firm conclusion that violent, or even non-violent but degrading pornography represented a significant harm to individuals and to society as a whole and that these two categories of sexually explicit designed-to-arouse materials should be condemned unhesitatingly. The Commission was again unanimous in asserting that to the extent that such materials met the Miller standard they should be prosecuted and, if possible, proscribed.

Is there a third category of sexually explicit designed-to-arouse material that is neither violent nor degrading and for which no real harm can be demonstrated that therefore does not merit such condemnation and possible legal proscription under the Miller standard? Because the Commissioners became hopelessly deadlocked on this issue it was resolved that each reserve the right to compose a personal statement outlining his or her thinking on the matter.

In my view, and perhaps in that of other Commissioners as well, this is the central theoretical issue of our year's debate. We were not able to resolve this question successfully and for me it represents a major failure of the Commission--not because we were unable to agree on the merits of the issue, or much less, that the other Commissioners did not agree with my own views, but because as a group we were unwilling, or perhaps unable, to confront or to correct or perhaps merely to adjust to the inherent limitations of our approach to the study of pornography.

This inherent and deceptive weakness in our approach--its fatal flaw in my view--also proved to be for us a fatal temptation, permitting the Commission to rely quite heavily--indeed almost exclusively-- on evidence of harms drawn from the empirical and social sciences to the virtual exclusion of other kinds of "evidence". While this methodology perhaps proved useful enough when we examined the potential consequences of exposure to category I and II materials, this over reliance on such evidence did not serve the Commission well in its examination of the allegedly more innocuous materials contained in our so-called category III.

I say "allegedly more innocuous" because implicitly an assumption began to grow among many Commissioners that sexually explicit materials that were neither violent nor degrading somehow had to be less harmful than materials not obviously so--and indeed, in many important aspects that is quite indisputably true. As a result the focus of our discussions centered more and more, and sometimes almost exclusively, on the harms to be ascribed to sexually violent and degrading materials and the evidence we considered almost exclusively that drawn from the empirical and social sciences--testimony and evidence that in and of itself necessarily lacks the probative force and authority some, when convenient, wish to ascribe to it.

The weakness of our approach, and one that in my judgment we refused as a body to deal with adequately--and that was the basis for much of the overt and covert disagreement among Commissioners--lay in the easy temptation not to examine the underlying sexual behavior depicted in all classes of pornography and to make fundamental ethical and moral judgments about this behavior.

Pornography is, after all, nothing more than the depiction of certain kinds of human sexual behavior. Quite apart, however, from any depiction in words or in photographs, it is incumbent upon society to make certain ethical and moral judgments about certain kinds of human behavior, not excluding sexual behavior. For example rape is not merely a crime, it is decidedly immoral quite apart from any depiction of it. Sexual behavior that degrades women--or men--is immoral quite apart from the photographic record of it that may exist to memorialize it.

At the heart of our disagreement over the existence, the nature and the extent of category III materials, in my view, was the inability and quite specific reluctance of the Commission to come to terms with the necessity of making ethical and moral judgments about the underlying behavior depicted in materials that would be contained in category III materials, e.g. certain sexually explicit solely designed-to-arouse depictions of heterosexual or homosexual behavior, or of group sex that were clearly neither violent nor obviously degrading, in the precise meaning of this term as used in our discussions concerning category II materials. I think it fair to say that by its refusal to take an ethical or moral position on pre-marital or extra marital sex, either heterosexual or homosexual, the Commission literally ran for the hills and necessarily postulated the existence of a third category of sexual materials designed to arouse that was neither violent nor degrading, and, that was in some vague and unspecified sense, permissable to some extent--even though much of it would have been judged obscene under the Miller standard.

A much larger issue is at stake here than the individual harm or degradation of a particular man or woman, or even of society itself caused by materials commonly and confidently ascribed to categories I and II. The question may be posed: does pornography, of any category, so degrade the very nature of human sexuality itself, its purposes, its beauty, and so distort its meaning that society itself suffers a grave harm?

The message of pornography is unmistakably and undeniably clear: sex bears no relationship to love and commitment, to fidelity in marriage, that sex has nothing to do with privacy and modesty and any necessary and essential ordering toward procreation. The powerful and provocative images proclaim universally--and most of all to the youth of our country--that pleasure--not love and commitment--is what sex is all about. What is more, that message is proclaimed by powerfully self-validating images, that carry within themselves their own pragmatic self-justification.

To pose the question in another way: is the imaging, the message-conveying power of sexually explicit, designed-to-arouse pornography so great that society must be concerned when that perniciously convincing message becomes well nigh universal among us? I think the answer to that question must be an unequivocal resounding yes!

Speaking for myself, and representing a view that perhaps could not carry the majority of the Commission, I would affirm that all sexually explicit material solely designed to arouse is and of itself degrades the very nature of human sexuality and as such represents a grave harm to society and ultimately to the individuals that comprise society. I find it very difficult therefore to affirm the existence of a third category of pornography that is neither violent nor degrading and not harmful.

To a certain but limited extent I have outlined my convictions further in two documents submitted to this Commission that can be found immediately following this statement. The first, entitled: Non Violent, Sexually Explicit Materials and Sexual Violence, purports to show how an argument might be drawn from social science itself that the widespread consumption of sexually explicit materials found in universally disseminated male magazines may well lead inevitably to increased rape rates. I think my conclusions, although I am no social scientist, while certainly not apodictic, are at the very least plausible.

The second, entitled: Pornography and Privacy, attempts to make a strong argument against all pornography based on its (pornography's) total and inadmissable invasion of a personal privacy so sacred and so inalienable that it must always remain inviolate. There are, in sum, certain rights so intrinsic, so foundational to the integrity of the human personality and our duties as citizens that they may never be surrendered. One of them is our personal liberty. Another is our sexual privacy.

For these reasons, and for others, I have concluded that for all practical purposes Category III does not exist, viz that sexually explicit materials designed to arouse that are neither violent nor degrading per se, nonetheless profoundly indignify the very state of marriage and degrade the very notion of sexuality itself and are therefore seriously harmful to individuals and to society, indignifying both performers and viewers alike in ways ethically and morally reprehensible.

If in fact such a category does exist, then I am persuaded that it is so limited as to be totally inconsequential and certainly not represented by the sexually explicit materials studied by this Commission.

To conclude otherwise, I fear, is to legitimate the existence of a group of materials that some would call "erotica and would in effect license as permissable and presumabl non-prosecutable, a large class of sexually explicit material designed to arouse that would all too easily send the clea message that the primary purpose of sex is for hedonistic selfishly solipsistic satisfaction.

To me, the greatest harm of pornography is not that som people are susceptible to or even directly harmed by the violen and degrading and radically misleading images portrayed all to graphically by mainstream pornography. Rather pornography' greatest harm is caused by its ability--and its intention--t attack the very dignity and sacredness of sex itself, reducin human sexual behavior to the level of its animal components.

In a certain sense the Commission was hoist by its ow petard. In its need to describe carefully and to delineat accurately the possible harms of pornography it adopted a approach and methodology and a system of proof quite suitable t establish the--if I may say it--the self evident, the per s nota, harms of violent and degrading pornography. When all i said and done, do the careful conclusions of the Commission wit regard to violent and degrading pornography surprise anyone, o does any rational man or woman seriously question the legitimac of these conclusions--quite apart from any "evidence" thought t establish such harms? The fact is that the Emperor doesn't hav any clothes on and he--as far as violent and degradin pornography is concerned--never did and it didn't need fou national Commissions (two American, one Canadian and one British) to "prove" it.

The fatal weakness--fatal because largely unacknowledged--of our approach, however, betrayed and undercut and sadly misdirected the Commission's efforts and prevented us from, in my view, considering adequately the more profound harms to individuals and society caused by pornography as a total genre. The unmistakable consequence for the Commission, in my judgment, was to ascribe more harm to the less harmful and to discount substantially and even to discredit the far graver and more pervasive harms caused by pornography not evidently violent or obviously degrading.

To put it in another way: the greatest harm of pornography does not lie in is links to sexual violence or even its ability to degrade and to indignify individuals. Pornography, all three categories of it--if indeed a third category exists at all--degrades sex itself and dehumanizes and debases a profoundly important, profoundly beautiful and profoundly, at its core, sacred relationship between a man and a woman who seek in sexual union not the mere satisfaction of erotic desire but the deepest sharing of their mutual and committed and faithful love.

This being said however, I hope no one will dispute the fact that while we did not succeed in resolving the major theoretical dispute before us, the approach and methodology adopted by the Commission did enable us to deal successfully with matters of great practical importance and concern to the American people.

The "Printed Word" Debate.

One of the most difficult and controversial issues that sharply divided the Commission was the special nature and especially protected character of the printed word. Simply put, the issue was this: does the printed word--including printed and non-pictorial pornography--deserve special consideration because of the unique relevance the printed word bears for First Amendment considerations and the precious right of political dissent in the United States, the almost exclusive burden of which is carried by the printed and spoken word?

I voted with the bare majority on this issue, upholding the special preeminence of the printed word and holding that, despite the fact that printed pornography can be declared legally obscene under the *Miller* standard, printed depictions merit special protection unless they involve the degradation and abuse of children.

Because my vote in particular seemed somewhat out of character in light of other government intervention with which I agree, and because it was virtually incomprehensible to some thoughtful people on the Commission and elsewhere, I take this opportunity to at least put on the public record the rationale for my vote.

It was abundantly clear from our discussions that virtually no current prosecution, on grounds of obscenity, of the printed word occur in the United States, and that furthermore, none are realistically contemplated because of the great difficulty and complexity of these prosecutions. Indeed, the Chairman of this Commission, Henry Hudson, conceded on the record that he could not conceive of ever undertaking a prosecution of the printed word.

The problem is of course that among this genre of printed pornography there exists a large body of materials that describe the sexual abuse of children and indeed, advocate for it. It is a particularly noisome and repellent body of literature that in effect is nothing less than "cook book" and how-to-do-it manuals, guides for the sexual exploitation of children.

I expressed to the Commission my strong conviction that unless these particular printed materials involving children were singled out for special and vigorous prosecution--excerpted as it were from the broad mass of printed pornography--the general reluctance to ever prosecute the printed word would prevent any attempt to proscribe these maleficent materials. It is my further conviction that the unanimous action of the Commission recommending the vigorous prosecution of obscene printed materials involving or advocating the sexual exploitation of children will, in fact, spur and aid prosecutors in the vigorous enforcement of the obscenity law, at least in regard to those materials depicting children. The hope of a total prosecution of obscene printed materials is disingenuous and futile--the crying need to prosecute to the full extent of the law those materials depicting the prurient sexual abuse of children is an urgent necessity.

A second reason led me to vote that special consideration be accorded the printed word. Fear of censorship was a constant theme of many witnesses who appeared before this Commission. I do not think we are entitled to judge that concern lightly, or to consider that those who express such anxiety are motivated by self interest. First Amendment values are crucial to American life and the virtual sanctity and integrity of the printed word central to the absolute freedom of political debate and dissent.

I do not agree with those who hold that efforts to regulate and proscribe sexually explicit materials according to the Miller standard signal a return to or adoption of a censorship mentality. In short I think that those possessed by such fears, while for them the fear may seem real, are quite simply wrong.

At the same time I thought it very important that the Commission send a strong message to the public that we do not favor a return to times when the repression of unpopular ideas was part of our political landscape. By the barest of margins, the majority of Commissioners adopted this view. I am proud to be among them.

The Indecency Standard.

This was another issue that sharply divided the Commission and one that only eleven Solomons could have reached consensus on. Once again I voted with the bare majority and would like to put on record my reasons for so doing.

The issue was, once again, central to the charge of this Commission and could be framed this way: Millions of American families are concerned about the virtual invasion of their homes by increasing amounts of increasingly explicit sexual depictions they find offensive and even dangerous to their families, most especially to their children.

The issue is fairly simple and straightforward for broadcast, non cable television. The FCC under its broad powers to regulate what can be transmitted over the air waves prohibits the dissemination of "indecent" words and images. The Supreme Court upheld this right in its Pacifica decision on the ground that citizens had a right to expect some regulation of broadcast materials coming into the home over which individual parents had no control.

The matter is not so simple with regard to cable television and other forms of satellite-transmitted programming. At least four court decisions, one of them in federal appeals court, have clearly established the essential diversity of broadcast and cable television and decreed that the "indecency" standard used to regulate broadcast materials could not and must not apply to cable television. In fact, the courts have so far declared, unanimously, that the application of the indecency standard to cable television is unconstitutional.

The issue is complex, not only by reason of the constitutional ambiguities that surround it, but also because, from a broader perspective, citizens have a right to be concerned about who and what are going to regulate what they may see on cable television.

Many witnesses who appeared before this Commission, for example, have pointed out, that if the "indecency" standard currently in force with regard to broadcast television were also imposed on cable television, most of the mainline Hollywood films currently on view in theaters across the country could not be shown on home television served by cable. It is hardly likely, even inconceivable, that the courts on any level, including the Supreme Court, would uphold such an extension of the indecency standard to cable television.

Indeed it is just as unlikely, regardless of an individual's particular ethical or moral persuasion, that such a blanket prohibition would be tolerated by the vast majority of the American people or the Congress that represents them.

There is still another compelling reason why many thoughtful people in this country would actively oppose any attempt to apply the same standards of broadcasting television to cable. Indeed, almost all of the principal religious denominations and religious broadcasters unanimously fought such an equation of broadcast and cable television on the grounds that it might seriously impede their own religious freedom to control their programming as they saw fit and might compel them to grant equal time to atheist or agnostic or anti-religious presentations.

Whatever one thinks of their argument, no one could plausibly accuse these religious leaders of not being sensitive to the import of their position or that they thereby were in favor of indecency on television. The fact is however, that unless we equate broadcast and cable television, the FCC has no constitutional right to regulate programming on cable using the indecency standard upheld by the Pacifica decision.

For all these reasons therefore, and for others, I voted with the bare majority not to recommend the current indecency standards for cable television.

I would strongly support, however, new legislation by Congress that could thread its way successfully through the Scylla of unconstitutionality and the Charybdis of over regulation of this medium by government.

It seems to me that Congress should look to the principles of New York v. Ginsberg--which allowed lower obscenity standards to apply if children are recipients of pornography--as a beginning toward unraveling this conundrum. Ginsberg allows the government to declare some pornographic material "obscene as to children" and to make its sale to children a criminal act. Is it not possible then, that certain material may be judged "obscene as to the home"--that is, judged by a standard that takes into account the special problems of parents in preventing access by their children to cable television or the telephone, and so be subjected to special regulation when it appears in those settings?

I am certain that all the Commissioners, regardless of ho they voted on this narrow issue, deplore the increasin appearance on our home television screens, whether broadcast o cable, of sexually explicit and frequently violent and degradin materials. We differ only on how to achieve the laudable end o protecting our children from this unwanted and dangerou incursion into the sanctity of our families.

Sex Education for Our Children.

Few problems have produced more genuine concern among mor Americans than the sexual awareness, behavior, and victimizatio of children. Few, if any, dispute the need of children fo knowledge about their sexual natures - its dangers and it promise, its mystery and its power. Yet few areas of publi discussion have engendered more bitter, if often legitimate, debate over the means appropriate to achieving a desired end.

This Commission found itself in the middle of that debat not out of choice but of necessity. We have seen and hear massive quantities of evidence concerning the abuse an exploitation of children by adults, both in the making and in th consumption of sexually explicit material. We have learned, a well, of the extraordinary extent to which sexually explici magazines, films, video tapes, telephone recordings, and book are a part of the life of our country's children and adolescents It has become increasingly clear to us that many children wh escape actual sexual abuse are nevertheless receiving thei primary education in human sexuality from a graphically inappropriate source, one which describes sexual fulfillment as conditioned upon transience, dominance, aggression or degradation.

We have seen, too, that in a society flooded with sexual imagery it is virtually impossible fully to "protect" children from becoming victims of misleading information about sex. Nor is it possible to expect that criminal and civil sanctions, however, vigorously applied, will wholly end sexual abuse. Teenagers, and to a great extent even younger children, must learn to protect themselves - both from exploitation by others and from the consequences of their own ignorance and immaturity.

At the same time, however, they deserve an understanding of the beauty of sexuality, and its role as the foundation of family and indeed of human civilization itself. While our charge is limited to examining the nature and effects of pornography, we would be remiss if we failed to note our passionate desire for careful, humane, and explicit instruction of children regarding the nature and effects of sexuality itself.

Unfortunately that desire only leads us directly to a central dilemma of our nation's pluralistic democracy. The very importance of sexuality makes it a central focus of almost every system of religious and ethical values. Teaching children about sex inevitably involves instruction about its relationship with morality and human relationships. Any attempt to evade such instruction or underlying values only results in teaching one

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specific moral assumption - that no relationship exists between sex and morality. Presenting instruction on sex combined with discussion of the full array of opinions discussed would largely dilute the importance of all of them. While these problems could be wholly avoided if full instruction on sexuality were provided to children by their parents, it is a sad fact that many, if not most, parents ignore or fail seriously in this responsibility.

This dilemma is unfortunate in part because I think we all believe that there is is a core group of values which can and should form the basis of instruction on sexuality. Above all, it seems to me we could agree that such instruction should be presented as one important, but not dominant, part of instruction on the family - its history, nature, and importance. The most important institution in human society, the family, is virtually ignored in modern education. That failing is particularly tragic because it is only within the context of exploring the meaning of the family that the meaning and role of sexuality can be understood.

The particular values that almost all of us think it important to emphasize in "sex education" - responsibility, commitment, fidelity, understanding, and tenderness - are precisely those which underlie our society's legal, social and moral assumptions about the family, and can only be effectively conveyed if the two topics are inextricably linked.

If a belief in the necessity of teaching those values with respect to sexuality were in fact shared by all Americans, it would be possible, I think, to devise a mandatory curriculum on human sexuality in the elementary and secondary public schools. Because it seems clear that no such consensus exists I have been forced, in thinking on this subject, to consider only the appropriate minimum action which is necessary and possible for federal, state, and local governments to take. As mandatory, explicitly value-laden age appropriate education in affective sexuality seems at present a task beyond the capacity of public schools, we can only center our hopes for providing such education on the willingness of families to undertake it. Within a voluntary framework, however, perhaps even within a released time context, we can urge the public schools to provide extensive opportunities for students to explore all the issues surrounding the creation and maintenance of families in the United States, with instruction on sexuality forming a substantial part of such a curriculum.

Finally, where children and youth need to learn how to protect themselves from exploitation by adults or manipulation by the media we can ask the schools to take a strong, mandatory role in providing them the facts.

If this year confronting the products of the pornography industry has taught me anything, it is that we are all profoundly ignorant of the way electronic and photographic images can be used to manipulate viewers. We continue, quite rightly, to insist that our children learn how our novelists and poets use language to shape and redirect emotions and values. Yet with regard to powerful graphic visual images designed to produce handsome profits through sexual arousal of viewers, we have allowed our schools to remain almost completely silent. Teenagers should be taught not only how their emotions and instincts are manipulated by viewing pornography, but also how the pornography industry exploits and abuses the persons used in making it. Such instruction would present none of the religious or moral quandaries of sex education generally, and seems to me a vital protective measure for our young--who are simultaneously the biggest consumers of pornography and the most vulnerable to its vicious effects.

A priest on the Commission.

A decent respect for the wholly creditable, almost entirely unspoken but perhaps genuine anxiety felt by some that my role as priest, my training and background as Roman Catholic theologian might somehow unfairly or unconsciously skew my thoughts and feelings on the issues before the Commission compels this word of assurance.

I do not think that I was invited to join this Commission because I was a priest theologian but rather because of almost 18 years of close personal experience and progressional involvement with literally thousands of sexually exploited children, many but not most of whom had been victimized in the actual production of pornography in which they were the hapless performers and "stars."

For this reason I asked a member of my staff, Gregory Loken, a gifted attorney and scholar in his own right as well as a noted advocate for the rights of children and Director of the Youth Advocacy Institute of Covenant House, to make a special study of the question regarding harms to performers in pornography. The Commission has made this statement its own and I consider it an important and original contribution to the research in this field. It is found in Part Four of the Report.

I freely admit to a certain bias in this regard. Nothing, absolutely nothing justifies the sexual abuse of children, and nothing, absolutely nothing - including the most perfervid defense of the First Amendment justifies the recording of this loathsome abuse on film. The Supreme Court of the United States in its unanimous 9-0 Ferber decision affirmed this special horror and declared that child pornography did not merit constitutional protection.

But when all is said and done I am who I am. I cannot exit from my personal skin, I can not divest of myself, anymore than any other citizen, of that "walking around collections of a priori assumptions" that in part help constitute who and what I am.

I am certain that despite some unfair prior assumptions to the contrary the Commission tried as fairly and honestly and objectively as it could to reach their conclusions as a result of honest and open debate. My position on the Commission carried for me an added important symbolic responsibility.

Since I was the only member of the Commission that could be ever thought to "represent" a major religion in the United States, I felt a special obligation to my fellow Commissioners and the people of this country not to adopt or impose a particular theological or sectarian slant on my contribution to the work of this Commission.

In short, I tried not to react as a Roman Catholic priest but as a citizen with a broader mandate and constituency. I hope therefore that my views represent a wide spectrum of the current American experience. At the same time I am proud to be what I am and would have it no other way.

The Writing of this Document.

The difficulties and complexities of this subject could hardly be exaggerated. One man's nudity is another man's erotica is another man's soft core pornography is another man's hard core obscenity is another man's boredom!

When, at the end of our public sessions it came time to synthesize the import of our debates and discussions in this report it became abundantly clear to the great majority of Commissioners that this report could not be a "staff document"---that is, a document compiled and assembled by the staff of this Commission could not represent fairly the differing opinions and conclusions of the Commissioners. This is not to denigrate the enormous contribution of the Commission staff. They merit the highest praise, especially its Director Alan Sears, for their round-the-clock effort to provide the Commission with the materials and support they needed. The staff worked with great diligence and zeal to perform their duties and much of this final report is a product of that diligence.

In the final analysis however, this report could neither be compiled nor assembled. It demanded single authorship. Quite simply this report could not have been written by Committee.

Professor Fred Schauer provided to this Commission the grace of single authorship and it is largely due to his wholly admirable effort in providing the "framing document" for this report that, in my view, we can present to the Attorney General and the American people a product of which I think we can all be proud.

Conclusion.

The Chairman of this Commission deserves the gratitude of every member of this body. His was an unenviable and awesome task--to oversee the taking of public testimony and to guide the public debate over the issues with fairness and objectivity. I think Henry Hudson acquitted himself of this responsibility in a wholly admirable way.

His unfailing courtesy to the members of this Commission and its staff was particularly noteworthy, especially when too many late-night sessions over-stressed us all.

To the other Commissioners I can only say thank you. It has been a privilege and rare honor to have served with them. I hope they share with me that pride of accomplishment as we submit this report to the American people for judgment.

I speak for myself yet I am certain the other ten Commissioners would echo my concern over the well nigh universal eroticization of American society. I am convinced, too, that the vast majority of Americans either intuitively or by rational conviction share our concern.

I urge therefore that our fellow Americans examine and debate our logic and conclusions carefully.

# Pornography and Privacy

Submitted by: Father Bruce Ritter

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> An American has no sense of privacy. He
> does not know what it means. There is no
> such thing in the country.
>
> George Bernard Shaw

If there is one single lesson we have learned from studying the "problem of pornography," it may simply be that Mr. Shaw's acid observations on American privacy may finally be coming true. Commercially produced material, regularly distributed to millions of Americans, shows other Americans, in explicit photographic detail, engaged in every variety of sexual intercourse. What might have been considered at one time the most private of human activities is now a matter not simply for public discussion but for graphic public display.

We have not fully agreed among ourselves whether this aspect of "pornography" - one which cuts across all the categories we have used in discussing other issues - should be deemed a "harm." Some of us have viewed the end of the taboo on public sex as at least an ambivalent event, with its possible benefits including an end to ignorant repression of knowledge and dialogue about sexuality. For the rest of us, however, the issue is a clear one, and, with limited exceptions explained below, we consider the assault of pornography on sexual privacy to be one of its most direct and corrosive harms. Because that view has not often been articulated in the debate over sexually explicit materials, however, we feel bound to explain it fully.

That explanation must begin by acknowledging that a concern for "sexual privacy" does not arise in every type of material considered "pornographic." That it arises at all is the result, as we attempt to explain, of deep cultural, moral, and even biological norms that are generally taken for granted, but not generally discussed. Finally the extent to which those norms represent values important to America and Americans - and the extent to which sexually explicit material offends those values - is a matter we believe deserving of substantial consideration by scholars, legislators, and the general public.

A. The Material in Question. That the debate over "pornography" has traditionally been carried on with only limited reference to questions of privacy is hardly surprising. Not until the last fifteen years - that is, *after* the 1970 Commission Report - did substantial quantities of material appear on the general market which depict full, highly provocative genital nudity and actual (rather than simulated) sexual intercourse. Many of the great "obscenity" debates of this century - on, for example, *Lady Chatterly's Lover* and *Tropic of Cancer* - in fact centered solely on the printed word.

Simulated activity, *drawings* of sexual conduct, and the printed word may cause concern on other grounds but they are largely tangential to discussion of sexual privacy. It is true, as Warren and Brandeis so eloquently explained almost a century ago, that grave damage may be done when "[t]o satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers."[3] Nevertheless it is also true that the process of such "broadcast" is a largely indirect one: for damage to occur the writer must be regarded as credible and the reader must exercise his imagination. Photographic representations as we explained in discussing the role of performers in modern commercial pornography, can show actual sexual relations in such a way that those who are shown cannot deny what happened, and those who view the depictions cannot avoid the full force of the images presented.

We thus limit our discussion of "pornography" in this section to that specific form of it which seems to have most urgent and clear-cut effects on sexual privacy - that is, photographic (or live) portrayals of actual sexual intercourse or of full genital nudity designed solely to excite sexual arousal.[4] The direct, unmediated public display of human beings in graphic sexual conduct is a new phenomenon in the history of culture, and it represents, in our view, a development harmful to both individuals and society at large.

B. Anthropological Perspective. While acutely aware of the limitations of anthropological evidence for arguing "what ought to be" for modern industrial society, we think it at least worth noting two propositions which are widely accepted by anthropologists and which seem of real importance for our inquiry: (1) public display of genitalia is extremely rare among human cultures; and (2) sexual intercourse universally occurs under conditions of privacy. Both have relevance as indicating basic taboos which are more often explained in moral or religious terms.

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[3] Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[4] Thus not only "mere" nudity, but any form of nudity which is used for purposes - artistic, scientific, political, or educational - other than simple sexual provocation are outside the scope of our analysis. We do not deny that privacy concerns may be implicated even in these displays, see, New York v. Ferber, 458 U.S. 747, 774-75 (O'Connor, J., concurring), but we do not believe the evidence suggests they represent nearly as substantial a threat to sexual privacy as the material we include.

1. Genital Nudity. In their still standard overview of 191 human cultures, Ford and Beach found that, "There are no peoples in our sample who generally allow women to expose their genitals under any but the most restricted of circumstances."[5]

In those few societies where women occasionally expose their genitals - e.g., the Lesu, Dahomeans and Kurtatchi - it is a deliberate gesture to invite sexual advance.[6] Conversely the social controls imposed by primitive, semi-primitive and advanced cultures appear to be founded in "the prevention of accidental exposure under conditions that might provoke sexual advances by men."[7] A number of societies, however, place no restrictions on display of male genitals, and in a few nudity by both sexes is accepted.[8] Even in those few which allow such nudity - e.g., the Australian aborigines - strict rules forbid staring at enitals.[9] It is therefore possible to say, in the words of one nthropologist, that "some form of sexual modesty is observed in ll societies."[10] That modesty distinguishes humans from all ther primates.[11]

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[5] C. Ford and F. Beach, Patterns of Sexual Behavior 94 (1952); W. Davenport, Sex in Cross Cultural Perspective in Human Sexuality in Form Perspective 115, 127-129 (F. Beach, ed. 1976).

[6] Ford and Beach, at 93-94.

[7] Id. at 94.

[8] Id. at 95.

2. *Sexual Intercourse*. If the privacy of genitalia is he subject of limited variation among cultures, the privacy of exual intercourse is not. Every human culture is characterized y an insistence on seclusion for sexual union, although physical onditions may make absolute privacy difficult to achieve.[12] hus when more than one family shares a dwelling, couples will enerally copulate in a secluded place outdoors.[13] Children are trictly admonished to ignore their parents' sexual behavior here it is possible they might see it. [14] Among humans, ccording to one scholar, "sexual privacy, like the incest

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[9] Davenport, *supra* note 1, at 128.

[10] *Id. See also* A. Kinsey, *et al.*, *Sexual Behavior in the uman Female* 283-285 (1953) (finding anthropological data showing cceptance of nudity only of children before adolescence).

[11] Ford and Beach, *supra* note 1, at 95, 105.

[12] Davenport, *supra* note 1, at 148; Ford and Beach, *supra* ote 1, at 68-71. Ford and Beach do list two partial exceptions o this rule - "some Formosan natives" who in the summertime copulate out of doors and in public, provided there are no hildren around," and "Yapese couples" who, "though generally lone when they engage in intercourse, copulate almost anywhere ut of doors and do not appear to mind the presence of other ndividuals." *Id.* at 68. Neither of these exceptions, on close nspection, applies to more than "some" members of what amounts o 1 percent of Ford and Beach's sample of 191 cultures.

[13] Davenport, at 150. Ford and Beach at 69-71.

[14] Davenport, at 149-150.

taboos, is virtually pancultural."15 Only chimpanzees amon all animals have the same absolute regime of sexual privacy - fact suggesting that this impulse is biological in nature.16

Margaret Mead's famous study of Samoan culture - widely regarded as a plea for more sexual openness - provides powerfu evidence for the extraordinary impulse toward sexual privacy eve in a society with sexual practices far different than our own There she found married couples sharing large rooms, but carefu to preserve some sense of privacy even within the house by mean of "purely formal walls" of mosquito netting.[17] *Outside* th house the urge to privacy is extraordinary, as she discussed i describing the sexual knowledge of Samoan children:.

> In matters of sex the ten-year-olds are equally sophisticated, although they witness sex activities only surreptitiously, since all expressions of affection are rigorously barred in public . . . . The only sort of demonstration which ever occurs in public is of the horseplay variety between young people whose affections are not really involved. This romping is particularly prevalent in groups of women, often taking the form of playfully snatching at the sex organs. [18]

Even in a culture she found to be so free of "stress an

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[15] G. Jensen, *Human Sexual Behavior in Primate Perspectiv* in *Contemporary Sexual Behavior: Critical Issues in the 1970'* 17, 22 (1973). *Accord*, D. Symms, *The Evolution of Huma Sexuality* 67 (1979).

[16] Jensen, *supra* note 12, at 67; Symms, *supra* note 12 a 67, n. 4.

[17] *Coming of Age in Samoa* 135 (1928, 1961 ed.).

[18] Id. at 134-35.

strain,"[19] the pancultural norms of sexual privacy were strictly observed.

C. Western and American Traditions. Margaret Mead's disdain for the "Puritanical self-accusations" which characterize Western attitudes toward sexual freedom did not extend to the insistence of our culture on the private nature of sexual conduct. And indeed, any such disdain would be impossible for an anthropologist, for sexual privacy is at the very heart of our own culture - assumed in every major strand of Western thought, and incorporated now in American common and constitutional law. So clear, indeed, is the strength of the traditional belief in sexual privacy, that we view only a brief discussion as necessary. The historical pedigree of that belief is traceable at least to the customs of the ancient world. One historian has found that for ancient Jews nudity was "barbaric and indecent," and that "[i]n Biblical times, it seems, the Hebrews did not come in contact with tribes that were not sensitive to the shame of nakedness."[20] In the ancient Hellenic world "nakedness was a vulgarity" that was publicly permitted only in such specialized settings as the gymnasium.[21] Indeed, Plato went so far as to urge shame and complete secrecy in all matters related to sexual liaisons.[22] And even the most graphic Greek paintings of sexual conduct used "formula" faces that were not meant to reproduce the features of specific persons.[23] Exposing the naked body of another person, in the ancient world, was a means of humiliation reserved for slaves and war captives.[24]

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[19] Id. at 234.

[20] L.M. Epstein, Sex Laws and Customs in Judaism 26-27 (1948) (emphasis added).

[21] Id. at 27. Romans did allow men and women to bathe together in the nude, id. at 29.

Developments in Western culture from its Judaic and Hellenic roots until only very recently were all in the direction of *strengthening* the already strict taboos of sexual privacy. Subsequent Western attitudes toward the subject were perhaps best summarized by St. Augustine, himself no stranger to sexual excess, even before the fall of Rome:

> And rather will a man endure a crowd of witnesses when he is unjustly venting his anger on someone than the eye of one man when he innocently copulates with his wife.[25]

Social conditions - in particular, housing consisting of one room for an entire family - even through the early modern and industrial periods of Western history made it difficult to maintain absolute sexual privacy in the home, particularly in the presence of family members.[26] But the first impulse of every class as it obtained the power to do so has been to obtain more personal privacy, particularly in respect to sexual matters.[27] By the beginning of this century sexual privacy had assumed so important a role in Western thought that Freud could suggest, with some force, that the awakening of sexual modesty was a crucial event in the founding of human civilization itself.[28]

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[22] Plato *Laws* 841 a-e.

[23] A. J. Dover, *Greek Homosexuality* 71 (1978).

[24] Epstein, *supra* note 19, at 31. "The male slave and the female slave had no sex personalities in the eyes of the ancients. They were considered as having no shame and incapable of causing the sense of shame in others." *Id.* at 29 r.

[25] *City of God*, Book XIV, pg. 468 (M. Dods trans. 1950). *See* J. Boswell, *Christianity, Social Tolerance and Homosexuality* 188 (1980) (discussing monastic proscriptions against nudity); Jewish traditions proscribing nudity continues well into this century. Epstein, *supra* note 19, at 29-37 (noting reluctance even in twentieth century to approve modern bathing suits for women).

Whatever its relation to civilization generally, privacy in sexual matters has long been a deeply ingrained part of American culture. From the often strict religious repression of the colonial period[29] through the more freewheeling nineteenth century,[30] sexual modesty was highly esteemed. Mark Twain and Henry James would have disputed the value of almost every social restriction of late Victorian society; on the need for sexual reticence, however, they stood shoulder to shoulder.[31]

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[26] P. Aries, Centuries of Childhood 106 (1962) (children in ancient regime believed to be wholly "unaware of or indifferent to sex"; "gestures and physical contacts . . . freely and publicly allowed [to children] . . . were forbidden as soon as the child reached the age of puberty").

[27] Stone, supra note 25, at 253-257.

[28] Civilization and Its Discontents 46 n. 1 (J. Strachey ed 1961).

[29] For a full discussion of the "essential" quality of sexual privacy in the colonial period, see D. Flaherty, Privacy in Colonial New England 79-84 (1972). See also F. Henriques, Prostitution in Europe and the Americas 230-45 (1965).

[30] See generally, Note: The Right to Privacy in Nineteenth Century America 94 Narv. L. Rev. 1892 (1981). The great exception to the America's Victorian sense of sexual shame was the cavalier treatment of slaves' privacy in the Old South. F. Henriques, supra note 27, at 245-63. That exception is in line with long established notions about the unimportance of sexual privacy for slaves. See, supra note 22.

D. Sexual Privacy in Modern America. The gap between novelists and the author of Portrait of a Lady is indeed a gr one, and it is clear that our more liberal notions of sexu reticence form a substantial part of the difference. Yet befo simply conceding that privacy in sexual conduct has be relegated to a minor role in modern American life, it would well to consider two important facts. First, for all the changing mores, Americans still appear to assert strongly the need for privacy in matters sexual. Second, American law in th century has recognized that need ever more forcefully. T combination of these facts, along with evidence from anthropolo and history, forms for us the basis on which the "harms" a "benefits" of pornography may, in this area, be assessed.

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[31] Compare, for example, the treatment of sexual tensi in Tom Sawyer with that of Washington Square. See also, T Secret Life I and The Secret Life II in S. Marcus, The Oth Victorians (1964) (describing as "unique" a memoir describing detail the sex life of a Victorian gentleman).

1. Attitudes and Practice. In launching their seminal investigation of American sexuality Alfred Kinsey and his colleagues had this to say about their subjects' need for privacy:

> Our laws and customs are so far removed from the actual behavior of the human animal that there are few persons who can afford to let their full histories be known to the courts or even to their neighbors and their best friends: and persons who are expected to disclose their sex histories must be assured that the record will never become known in connection with them as individuals. 32

In the nearly four decades that have followed, many of Kinsey's hopes for greater sexual tolerance have been realized, but the acute need for sexual privacy has remained. One of the best indicators of that need has been in fact a wrenching problem for researchers attempting to conduct scientific study of pornography: the extraordinarily low volunteer rate for such experiments. In one careful study specifically designed to measure differences between volunteers and nonvolunteers in a sex-film experiment, less than one third of the males and only one in seven of the females agreed to participate if they would be required to be "partially undressed (from the waist down)."33

Indeed, no more than half of another group agreed to participate even when told only that they would be watching "erotic movies depicting explicit sexual scenes," with no

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[32] Sexual Behavior in the Human Male 44 (1948).

[33] Wolchik, Braver & Jensen (1985). See also, Wolchik, Spencer & Lisi (1983).

references to undressing and with assurances that they would be wholly unobserved and that all data would be completely confidential.34

Two interesting pieces of evidence from Canada, for which no comparable data for the United States exist, offer a parallel to these laboratory observations. The Badgley Committee surveyed 229 juvenile prostitutes and found that almost 60 percent of both males and females had been asked at least once by clients to be the subjects of sexually explicit depictions. Yet among those requested - teenagers desperate for money who regularly sold their sexual favors to strangers - less than a third agreed to be photographed.35 Of equal significance, the Fraser Committee conducted a national survey to determine the attitudes of Canadians toward pornography, and found that while 66 percent of their sample declared private viewing of sexually explicit material to be acceptable, only 32 percent could approve of the production of such material, even if no one is "hurt" in the process.36 Apparently pornography previously produced with someone else's son or daughter is tolerable to Canadians; material which might be produced with one's own child is not.

In reaching our conclusion that current American mores continue tightly to embrace sexual privacy, we note that American psychiatrists adhere to their longstanding view that

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[34] Wolchik, Braver & Jensen (1985).

[35] Badgley Report at 104.

[36] Fraser Report at 104.

exhibitionism and voyeurism are clear and saddening personality disorders. One overview of their effects finds that they:

> are accompanied by an inconspicuous but real alteration in character, with chronic anxiety beyond the immediate fear of being caught, guilt, fear of losing one's mind, shame, and, usually, inhibition of normal sexual responses. Relief after arrest is common.[37]

Pornography aside, healthy Americans simply do not attempt to peek into other people's bedrooms, and have no interest in showing off their sexual organs to strangers. The "chronic anxiety" attending exhibitionism and voyeurism is thus a reflection of our society's deeply shared commitment to preserving the privacy of sex.

2. The Law. That commitment has firm, if only recently developed, expression in American law. After the Warren and Brandeis article of 1890 [38] - which was provoked by the outrage of a Boston matriarch over the smarmy treatment by the newspapers of her daughter's wedding [39] - the right of Americans to be free from publicity about the graphic details of their sex lives became enshrined as a fundamental principle of the common law.[40]

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[37] A. Stanton Personality Disorders in The Harvard Guide to Modern Psychiatry 283, 292 (1980). See Riley, Exhibitionism: A Psycho-Legal Perspective, 16 San Diego L. Rev. 853, 854-57 (1979).

[38] See, supra note 1.

[39] Prosser, Privacy, 48 Cal. L. Rev. 383 (1960).

[40] See, Restatement (Second) of Torts 652D, Comment L (1977); Wood v. Hustler Magazine, Inc., 736 F. 2d 1084 (1984), cert. denied 105 S. Ct. 783; Melvin v. Reid 112 Cal. App. 285, 297 91 (Dist. Ct. App. 1931).

As we discussed in our review of the use of performers pornography, the courts have recently recognized that th principle may be applied to protect those who are photograph while nude or engaged in sexual relations.[41] The Supreme Cour in New York v. Ferber, seemed recently to imply that the "priva interests" of those depicted in pornography may have, as wel constitutional weight even on the strongly tipped scales First Amendment analysis.[42] The special importance of sexu relations has for more than two decades been crucial to t development by the Court of the whole concept of constitutional "right of privacy."[43]

E. Pornography and the Harm to Privacy. Simply stati what is does not resolve what ought to be. Finding that sexu privacy is pancultural, that it has been a stable feature western civilization for as long as we have knowledge, and th it currently remains highly valued by Americans in the attitudes, practices and laws, does not ineluctably require finding that the taboo of sexual privacy ought to *continue* to held in such high esteem. But we think that these finding while not constituting a form of "proof" themselves, a nevertheless crucial in assessing where the *burden* of proof oug to rest. In all fairness, we believe, it should rest on those seeking to sweep away the taboo.[44] Does current, photographic pornography offend that taboo? And if so, what is the harm? The answer to the first question is obvious to anyone who views the wholly graphic, undiluted sexual exhibitionism inherent even to "consenting pornography." Nothing is left for the viewer to imagine; no attempt is made to conceal either the face or the genitals of the performers. The consumer of "standard" pornography in the 1980's, unlike the consumers of the materials generally available at the time of the 1970 Commission Report, is a full witness to the most intimate, the most private activity of another human being.

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[41] *See*, Use of Performers in Commercial Pornograph *supra*, in Part Four.

[42] 458 U.S. 759 n. 10; *See also*, *Bell v. Wolfish* 441 U. 520, 558-60 (1979) (recognizing "privacy interests" of prisone implicated by strip searches).

[43] *See especially*, *Griswold v. Connecticut*, 381 U.S. 4 (1965). *See also*, *Carey v. Population Services Int'l*, 431 U. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

That this is a "harm" we think undisputable, on several grounds. First, those who "perform" in current pornography are, as a group, extremely young, ignorant, confused and exploited; as we have discussed in our examination of their situations, they very frequently cannot be said to have given an informed consent to their use. Second, even when such consent exists, such performances, where they are given in exchange for money, are inseparable from prostitution, and degrade the performers in exactly the same ways as prostitutes are injured by their profession. Neither of these concerns applies, by contrast, to the making of noncommercial, sexually explicit films for use in education or sex therapy - arenas where the reputations of performers are unlikely to be damaged.

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[44] Likewise we believe that the critics of sexual taboos regarding incest or child molestation, see e.g., L. Constantini, The Sexual Rights of Children: Implications of a Radical Perspective, in Children and Sex 4 255 (1981), must bear a similar burden of proof in arguing their cause.

Quite apart from injury to performers, though, we believe that injury occurs to society as a whole from such performances, injury that may best be described as the blurring of legitimate boundaries for public dialogue on sexuality. Where no reticence is allowed, where only the act of sex is regarded as an authentic statement about its meaning, most citizens can be expected to withdraw, rather than enter the discussion. Reducing the general sense that some aspects of every person's sexual life are so unique as to deserve special deference means, we think, that many will all the more militantly seek to shut out any dialogue on sexuality altogether. The virulent, devastating divisiveness over sex education in the public schools is, we think, a symptom of the fears that can arise from this destruction of the sense of boundaries.

Now against all of this, what proof is offered that the taboo of sexual privacy should be dismissed with regard to filmed pornography?

Some argue, convincingly enough, that such pornography expresses an idea, if no more elaborate an idea than an attack on sexual privacy itself. Yet that is hardly an argument against the "harm" we have discussed, for ideas can be as harmful as, indeed more harmful than a wide variety of more concrete afflictions. Others contend that the extreme reticence on sexual matters practiced by our society in the past was repressive of and injurious to healthy sexuality. That is also, so far as it goes, true enough. But do we need to pay other people to copulate for us on film in order to discuss sexuality freely?

Surely the case for that need has not been made with even minimal rigor. And even if it had been made, we remain convinced, as we said above, that as many of us are silenced in the resulting dialogue as are given voice. Indeed, after a year of witnessing the grotesque sexism of commercial pornography, we now have begun to understand what Catherine MacKinnon, Andrea Dworkin, and others meant when they told us that pornography "silences" women.

Photographic pornography silences and it also degrades.[45] With the exception of noncommercial material produced for educational or therapeutic purposes, it exploits some human beings in violation of some of mankind's deepest instincts about the privacy of sexual conduct. The "right of the Nation and of the States to maintain a decent society,"[46] recognized in dissent by Chief Justice Warren and by a majority of the Supreme Court since 1973,[47] largely means only this: some aspects of American life, and of American sexual behavior, deserve special protection from intrusion, public display, and commercial mass-marketing. Mr. Shaw - and the sex industry - to the contrary notwithstanding, Americans do know the value of privacy. And it is a value that commercial pornography deeply offends.

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[45] *Compare*, Williams Report 138 (live sex shows considered "especially degrading to audience and performer's" because of their "being in the same space" during performance of intercourse; no account taken of the fact that photographic pornography can only be made if cameraman or photographers is "in the same space" as the performers), *critized in* Dworkin, *Is There a Right to Pornography?* 3 Oxford J. Legal Stud. 177, 180-183 (1981).

[46] *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964).

[47] *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 59-60 (1973) (quoting Warren).

## NONVIOLENT, SEXUALLY EXPLICIT MATERIAL AND SEXUAL VIOLENCE

I. Background
    A. The Problem of Definition
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Submitted by Father Bruce Ritter

## I. Background

The alleged relationship of sexually explicit material and sexual violence has long been a subject of acrimonious but compelling debate. The "Effects Panel" of the 1970 Commission, often accused of denying such a link, instead stated a relatively moderate view of what was then an almost entirely new area of inquiry: "On the basis of the available data . . . it is not possible to conclude that erotic material is a significant cause of sex crime."[1] Recognizing the impossibility of ever proving "conclusively" the existence of such a casual connection, the 1970 Commission nevertheless determined that the evidence did not, at the time, suggest a "substantial basis" for such a proposition.2

The findings of our predecessors, though beleagured in this area by extensive professional criticism,[3] are entitled to significant deference, especially because the 1970 Commission took pains to explain the basis of its conclusions. Rape, however, is among the most violent and damaging of crimes: not only inflicting deep injury on its victims, but also standing as a powerful obstacle to the fight for sexual equality in a democratic society. It is, further, an evil which has increased at shocking rates over the last fifteen years. We thus have the grave, and undeniably unpleasant, duty to examine again the possibility that consumption of sexually explicit materials and some rapes are causally linked - and to report, on the basis of the evidence available now, whether a "substantial basis" exists for believing in such a link.

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[1] 1970 Commission Report, at 287. See, Fraser Report at 99; Williams Report at 6186.

[2] 1970 Commission Report at 286-87.

[3] For a review of many of those criticisms see Donnerstein & Malamuth (1984).

We have with little trouble concluded that circulation of materials which themselves portray graphic sexual violence is a probable "cause" of rape - at least in the sense of being one factor among many (and not necessarily the most important) which increases the likelihood of rape. With regard to sexually explicit materials which do not include depictions of violence our task is more difficult because so many of our witnesses, so many professionals, and so many of our fellow citizens disagree vehemently on the issue. Tempting as it is simply to wash our hands of the question by noting the existence of the dispute and refusing to "take sides" in it, we cannot avoid sifting through the evidence and attempting to come to our own conclusions on the matter. Even if we cannot ultimately agree on the purport of each piece of evidence, or the meaning of all the data collectively, our views should be fully, and publicly explained.

A. Problem of Definitions. One serious obstacle to such explanations, unfortunately, arises immediately in the guise of defining the material under examination. For purposes of general discussion about the possible "harms" of sexually explicit material we have found it useful to divide that material into three somewhat imprecise, but nonetheless useful categories: that which is (1) violent; (2) "degrading" but not violent; and

(3) neither violent nor "degrading". Unhappily our scheme was not anticipated in advance by researchers, and though a useful blueprint for future scientific inquiry, has not formed the basis for research conducted in the past. The only distinction adhered to with some consistency in the past research has been that between those materials which depict violence and those which do not. Obviously that distinction is a crude one given the wide range of nonviolent "pornographic" materials, yet it may in some sense correspond with popular perception: thus public opinion seems strongly opposed to free circulation of materials "that depict sexual violence," but sharply divided over the fate of materials that "show adults having sexual relations," with no further explanation of whether the materials in question are "degrading" or not.[4]

For purposes of examining the evidence regarding sexually explicit materials and sexual violence, then, it seems useful to begin, at least, without clearcut distinctions based on the "degrading" character of particular items. Rather, the case for linking nonviolent materials and rape should be examined on its own terms - that is, on the basis of definitions contained in the relevant research - with attention, ultimately, to those pieces of evidence which bear on the question of distinctions among various categories of nonviolent materials. Until we sort through the evidence on this issue we cannot, after all, be certain that boundaries useful for distinguishing among materials on observable attitudinal effects are equally valuable with regard to behavioral impacts.

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[4] 1985 Newsweek Poll. Forty-seven percent of respondents would ban magazines showing adults having sexual relations, but only 21 percent favored such a ban for magazines depicting "nudity". Because many current popular magazines are clearly "degrading" in their portrayals, the difference in views seems more related to sexual explicitness than to the positive or negative portrayal of the person depicted.

B. Evidence and Standard of Proof. The assumption that consumption of sexually explicit material "causes" sexual violence is one that some 73 percent of Americans would accept as true,[5] but it is unclear what evidence they would point to as crucial to their judgment. From our standpoint some forms of evidence are clearly more persuasive than others, but no one is useless and none dispositive. Evidence from the social sciences - correlational, clinical and experimental - seems by a wide margin the most important tool of analysis in this area, in part, paradoxically, because its limitations are most apparent. The results of individual experiments or studies can be rigorously challenged on terms universally accepted by social scientists, and can be examined as carefully for what they do not "prove" as for what they do. Anecdotal evidence, even that presented by skilled professionals, has an unfortunate tendency to touch on a wide range of questions without furnishing the basis for answering any single one of them.

Particularly on an issue as bitterly fought and important as this one, therefore, reliance primarily on data from the social sciences seems appropriate and quite possibly imperative.

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[5] Id.

That does not mean, however, that we are bound by the standards of "proof" which govern the work of social scientists. Our task after all, is to recommend policy based on existing knowledge in an area that will always be plagued by uncertainty. Because of limitations on the capacity of social science to measure events outside the laboratory, and because of clear ethical boundaries on what research can be conducted in this area even in the laboratory,[6] it seems wholly unlikely that the extremely high standards for "scientific proof" can ever be satisfied one way or the other on this issue.

The standard more appropriate for our purposes is suggested by the phrase used by the 1970 Commission: is there a "substantial basis" for believing that nonviolent but sexually explicit material is causally linked to sexual violence? If so, what evidence suggests the opposite conclusion - that no such link exists? Finally, which evidence on balance is more persuasive? (This standard was used by us as "the totality of the evidence" in our discussions.) Because rape is so widespread and so dangerous an evil, government action against constitutionally unprotected material might be appropriate if a "substantial basis" for believing in a causal link between such material and sexual violence exists, and might seem imperative if the evidence allows a stronger assessment. Just as government action against cigarette advertising could not await final, irrebuttable "scientific proof" of the causal link between cigarette smoking (let alone cigarette advertising!) and lung cancer, so the government may not be able to await scientific consensus on the pornography/rape connection - even if such consensus were imaginable.

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[6] See, e.g., Linz (1985) (excluding subjects from experiment if "psychoticism" or "hostility" score exceeded 1.0 on Symptom-checklist 90); Check (1985).

II. The Evidence

Because direct experimental research on the alleged causal relationship between sexually explicit materials and sexual violence is impossible, or at least unthinkable, we are unhappily left to examine evidence of an indirect nature. That evidence, when it comes from the work of social scientists, tends to take one of two forms: correlational studies and laboratory experiments. The former is a useful launching point for an overview of the issue, because it measures statistical relationships between actual sexual violence and actual consumption of sexual materials. Were no significant relationship found to exist between those two phenomena even on a statistical level, any causal connections between that be extremely difficult to demonstrate through work in the "artificial" setting of a laboratory. Such a setting is useful, however, for exploring possible causal relationships between statistically correlated events; and that is the sense in which experimental evidence is relied on here. Before *either* correlational or experimental evidence is examined, however, it is crucial to consider first whether sexual violence is a problem which might *ever* be affected by social change, and whether, in fact, as an aggregate phenomenon it has increased during the period in which sexually explicit materials have been widely available.

A. Changes in Rape Rates. That first question is easily answered. Rape rates do seem to be related to social change, for they have increased alarmingly during the past 25 years. From 1960 to 1970 the rate of reported forcible rape rose by 95 percent, but that increase seems to have been no more than part of an explosion of violent crime generally, which rose fully 126 percent during the 1960's.[7] Since the report of the 1970 Commission, however, the rate of reported rape has risen almost twice as fast as violent crime generally;[8] from 1970 to 1983 the rape rate virtually doubled, while the rate of reported homicides, for example, remained constant.[9] In 1970 one out of every 20 violent crimes was a forcible rape; by 1983 the proportion had become one out of 16.[10]

Was this extraordinary rise in rape a "real" occurrence, or merely a product of increased reporting of rape? The possibility that increased sensitivity to rape - fueled by movements for women's equality - led to increases in the willingness of individuals to report rapes is not one that can lightly be dismissed,[11] for rape is highly underreported crime.[12] Nevertheless at least three pieces of evidence suggest that the increase of reported rape is not tied to increased willingness-to-report. The National Crime Survey, to begin with, which attempts to gauge *actual* (as opposed to reported) crime figures through a scientific public survey, showed no significant change in the percent of rapes reported to police from the period 1973-1977 to that of 1978-1982.[13] Yet between those two periods the average number of estimated actual rapes increased substantially.[14]

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[7] Sourcebook of Criminal Justice Statistics 380 (1984) (hereinafter Sourcebook).

[8] Id. The high point of both general violent crime rates and reported forcible rape rates came in 1980, the former having risen 60 percent and the latter 95 percent from 1970 levels. From 1980 to 1983 the rate of all violent crime fell 9 percent, while reported forcible rape rates dropped by 7.5 percent. Id.

[9] Id.

[10] Id.

Second, the 1978 survey by Professor Diana Russell found an increase in the "true rape rate" throughout most of this century;[15] thus historically no serious misrepresentation of trends in this area is found in police data. Finally, correlational data from recent studies of state-by-state rape rates and measurements of the status of women indicate only a small, although significant, relationship between the two.[16]

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[11] Rapid social change associated with "women's liberation" may also be viewed, of course, as making rape itself more likely - through setting up more possibilities of "acquaintance rape". *See* Geis & Geis, *Rape in Stockholm: Is Permissiveness Relevant?* 17 Criminology 311 (1979). Women raped by "friends" may be less willing to involve criminal sanctions against their attackers. Thus it is at least arguable that "women's liberation" may in some respects have had a *dampening* effect on rape reporting rates.

[12] National Crime Survey figures indicate that no better than half of all rapes are reported. *Sourcebook*, *supra* note 6, at 274-275.

[13] Between 1973 and 1977 an average of 46.2 percent of all rapes went unreported according to the Survey; between 1978 and 1982 the average percentage of unreported rapes stood at 48.2. *Id.*

[14] Between 1973 and 1977 the average estimated number of actual rapes per year was 152,877; between 1978 and 1982 the average stood at 173,353, an increase of 13 percent. *Id*.

[15] D. Russell, *Sexual Exploitation*, 52-57 (1984). Professor Russell's survey was conducted in 1978, and so is of little value for determining recent trends in rape reporting. It

Rape appears, therefore, to be a phenomenon subject to fluctuation, and during the period that sexually explicit materials have come into general circulation it has been a phenomenon on the rapid increase. That last fact, however, in no sense "proves" or even substantially "suggests" a relationship between the two events; only detailed correlational analysis can begin to do that.

B. Correlational Evidence. Our predecessors on the 1970 Commission had no sophisticated "correlational" data before them. Indeed, the only "correlational" data which they considered was of the sort discussed above - general trends in the sex-crime rates measured for time periods in which sexual materials were becoming more available. Unfortunately, for reasons discussed below, that sort of evidence is far too crude to be of significant value, and points, in any case, in no particular direction. Far superior correlational data has in the meantime

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does attest, however, to the fact that, historically, upward trends in police reports of rape have been consistent with actual incidence of the crime.

[16] Baron and Strauss (1984), for example, found that every change of one standard deviation in the Status of Women Index in a given state is associated with a change in the rape rate of only 0.43 rapes per 100,000 population. By contrast, such a change in the homicide rate would result in a swing of 1.70 rapes, and a one-standard-deviation change in the Sex Magazine Circulation Index would cause a swing of 5.99 rapes (the highest of any variable studied). Id. at 200.

come to the fore, and it shows that a statistical relationship does appear to exist between consumption of certain types of sexual materials and rape rates. Both types of data invite the most careful attention.

1. Danish and Other Cross-Cultural Data. The 1970 Commission was impressed, as was the Williams Committee later, by studies on Denmark conducted by Berl Kutchinsky in which he found that relaxation of Danish pornography laws coincided with a decrease in reported sex crimes. Since that time Kutchinsky's work has been repeatedly criticized, and he himself has been forced to concede that, at least with regard to rape, liberalization of pornography laws was followed ultimately by increases in reports of rape to police.[17] Further, Kutchinsky's approach fails to be even minimally persuasive for two crucial reasons. First, he does not account in any meaningful way for other social forces which might have affected Danish sex crime rates independently of pornography consumption. He fails to note, for example, that sex crime rates in Denmark might have been artificially high during the 20 years after the German occupation of World War II, a conflict described by one historian of Scandinavia as "shattering physically as well as emotionally."[18] A drop in sex crimes during the late 1960's and after would thus

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[17] Kutchinsky (1984), at 24-25. Kutchinsky attempts to limit the damage of this concession by noting that the increase in rape reports did not substantially begin until 1977, several years after liberalization. He is not, however, able to rule out the possibility that Danish consumption of pornography took some time after legalization to reach substantial proportions.

[18] F.D. Scott, Scandanavia 247 (1975).

be the result simply of recovery from social disintegration wrought by war. Second, and substantially related, Kutchinsky fails to consider the case of Norway - a country with a similar culture and a similar war experience - which has maintained far stricter laws against pornography,[19] and has apparently enjoyed even greater success in combatting sex crimes.[20] In the end Kutchinsky's analysis seems shallow and almost completely without value for analysis of the American experience and American policy.

A more appealing cross-cultural approach, but one with only marginally greater usefulness for our purposes, is that taken by Dr. John Court (1984). His research has examined the temporal changes in rape rates in a wide variety of countries in periods of greater or lesser legal control of pornography. His conclusion, presented with considerable cogency, is simply that greater legal control of pornography appears to hold down rape rates as well. Yet for all its resourcefulness Court's work fails, like that of Kutchinsky, to place the changes studied in careful historical and cultural perspective: thus Singapore, South Africa, Australia and Hawaii are all compared with little contextual information. An additional, related limitation on the helpfulness of his findings arises from his inability to show, like Kutchinsky, whether *actual* consumption patterns fit neatly into the patterns of changing *legal* regulation of sexually explicit materials. Our experience of American enforcement of obscenity laws indicates that such laws are often honored as much in the breach as in the observance.

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[19] See, General Civil Penal Code of 22 May, 1902, Para. 211, as amended by Law of 24, May, 1985 (received in translated form from Jan Farberg, Norwegian Information Service).

[20] According to the Public Information Office of Interpol the rate of reported sexual offenses in Denmark dropped 14.2 percent from 1970 to 1981. In West Germany, another country with liberal obscenity laws used by Kutchinsky in support of his argument, the rate dropped 19.8 percent during that span. In Norway, however, the drop was 33.7 percent in reported sex offenses form 1970 to 1981. These figures are not necessarily computed in the same manner from country to country and should thus be considered only with extreme caution. Nevertheless they do suggest the grave problems in Kutchinsky's selective use of sex-crime figures from one or two locations unembarrassed by historical or cross-cultural analysis.

2. *Sex-Magazine Circulation*. Interesting as the work of Kutchinsky and Court is, we have had the benefit of receiving a body of correlational evidence of far greater power. The research of Baron and Strauss (1984, 1985) supplemented by others, has shown a strong statistical relationship between state-by-state circulation rates for the most widely read "men's magazines" and state-by-state reported-rape rates. That relationship persists even when every other factor theoretically associated with rape is controlled for: indeed, they found that the Sex Magazine Circulation Index has a consistently stronger statistical relationship with rape rates than *any* other factor tested.[21] Further, in the model developed by Baron and Strauss other variables theoretically expected to be related to rape rates in fact met expectations: those factors (e.g., percent urban, percent poor) together with the Sex Magazine Circulation Index explain 83 percent of state-to-state variation in rape

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[21] *See* note 16, *supra*.

rates.[22] Two independent studies, by Scott (1985) and Jaffee

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[22] Scott (1985a). In another study Scott (1985b) found that no significant statistical relationship existed between rape rates in the states and the number of "adult theatres" per 100,000 residents in each state. That finding, however, is of almost no value on several grounds: (1) the study did not use multiple regression analysis to examine possible interdependence of the variables; (2) the number of "adult theatres" is an almost completely meaningless figure in view of the fact that each such theatre will sell a different quantity of sexually explicit materials, and no account is taken of that variation; and (3) "adult theatres" are so restricted by zoning, obscenity laws, and the need for urban or semi-urban locations that they cannot be assumed to measure exposure to sexually explicit materials among males who can, if necessary, purchase such materials through the mail.

In their joint statement Commissioners Becker and Levine attempt to discount the importance of this correlational evidence by pointing to a letter from one of the researchers involved, Murray Strauss, which states (1) the correlational research does not "demonstrate" that pornography causes rape," and (2) "the scientific evidence clearly indicates that the problem lies in the prevalence of violence in the media, not on sex in the media." Id. at 13. Strauss' first statement is uncontestable: no correlation can, by itself, "demonstrate" causation. Strauss' concern about "misinterpretation" of his research seems somewhat bizarre in view of his published statement that his "findings suggest that the combination of a society that is characterized by a struggle to secure equal rights for women, by a high readership of sex magazines that depict women in ways that may legitimate violence, and by a context in which there is a high level of nonsexual violence, constitutes a mix of societal characteristics that precipitates rape." Baron & Strauss (1984), at 207. He then intimates that research suggests "social policies directed toward eliminating or mitigating the conditions that make rape more likely to occur." Id. It is Strauss, not the Commission, who has made suggestions of causal linkage based on correlational data alone. See also text to note 23.

With regard to his second observation, that violence in the media seems to be "the problem" rather than sex, the research is very far from "clearly" indicating any such thing. Thus it has been found that with regard to same-sex interactions, nonviolent but highly arousing erotic material facilitates aggression substantially more than "violent" material. Donnerstein (1983b). And when, angered males are shown a nonviolent, "erotic" film, then allowed a short delay before testing, their aggressive behavior toward women has been shown to increase dramatically, to levels far higher than for similarly treated subjects shown violent or neutral films. Donnerstein & Hallam (1978). The "delay" factor seems crucial, as measurements of aggression toward women taken immediately after film exposure tend to and Strauss (1986) have not only replicated the Baron an Strauss results for different years, but have cast doubt o potential "third factors" which would make the sex-magazine/rap association spurious. Baron and Strauss offered two suc factors as possibilities: (1) a cultural pattern emphasizin "compulsive masculinity"; and (2) the degree of "sexua openness" within states. The first of those suggestions wa undercut by Scott's finding that circulation of men's "outdoo magazines" is not associated with state-by-state rape rates. I addition, Baron and Strauss found that controlling for the "inde of legitimate violence" and the general violent-crime rate - bot seemingly plausible measures of a culture of "compulsiv masculinity" - in no way lessened the sex-magazine/rap correlation. Nor did controlling for measures of the status c women - a plausible inverse measure of the degree of "compulsiv masculinity" within a given state. Finally, the recent work c Check (1984) and Zillman and Bryant (1984, 1985) indicates tha under experimental conditions, massive exposure to mainstrea pornography may cause male viewers to become more callous an domineering in their attitudes toward women. Thus pornograph may itself be a causal factor in creating a culture c

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suggest that "erotic" material does not increase aggressio Donnerstein (1983b); Donnerstein & Berkowitz (1981). Thi "delayed reaction" effect is similar to that found by Zillman Bryant (1982, 1984, 1985), in which "massive exposure" t nonviolent, degrading pornography over six weeks produc dramatic increases in subjects' acceptance of "rape myths" an sex callousness." (By contrast Linz (1985) did not find suc effects after a substantially shorter exposure period. Obviously this experimental data is still at a primitive stag but it hardly warrants the interpretation Strauss gives it.

"compulsive masculinity," and even if a correlation could be shown between such a culture and the incidence of rape, the association of the latter with sex-magazine circulation would still not be proved spurious.

As for the other "third factor" suggested - the degree of "sexual openness" - the recent study of Jaffee and Strauss (in press) measured the impact of the Sexual Liberalism Index on the Baron and Strauss formulae. While finding that sexual openness and tolerance is correlated, to a small but significant degree, with increases in reported rape rates, Jaffee and Strauss discovered that inclusion of the new index had no effect at all on the sex-magazine/rape association. While continuing to hold out hope - against all the evidence mentioned in the previous paragraph - that a relationship between "hypermasculine gender roles" and rape rates would render the sex-magazine correlation spurious, they felt compelled to conclude that their research "suggests that there may be more to the pornography-rape linkage than originally expected. That is, the type of material found in mass circulation sex-magazines may, as claimed by critics of such material, encourage or legitimate rape."[23]

3. Sex Offenders and Pornography. Somewhat less sugges-

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[23] Jaffee & Strauss (in press) at 10. Rodney Stark, in Demonstrating Sociology (1985), has claimed to disprove the Baron and Strauss correlation, at least with respect to Playboy's circulation rates. Id. at 29-31. Because Stark's discussion of the issue is openly informal, and because the Baron and Strauss results have been replicated formally by others, Stark's view is not persuasive. See, Koss (1986) (in large sample of college students there existed a statistically significant relationship between prior consumption of pornography and self-reported sexual aggression).

tive and useful, but nonetheless important, is correlationa evidence exploring links between the use of sexually explici material by sex offenders and their behavior. Dr. Gene Abel' (1985) study, in particular, is directly pertinent to the issue raised by Baron and Strauss: in treatment of 247 outpatient se offenders (paraphiliacs), well over half admitted to use of adul men's magazines or similar material, and 56 percent of rapist stated that such materials "increased their deviant sexua interests." Comparison of those offenders who use "erotica" ar those who do not produced only one statistically significar difference of direct relevance: users of "erotica" maintaine their paraphilia far longer than nonusers. Between those whos deviant arousal was increased by "erotica" and those whos deviant arousal was not increased two statistically significar differences emerged: (1) the aroused-by-erotica subject maintained their paraphilia longer; and (2) they had les "ability to control their behavior." On the whole, Dr. Ab concluded that "[e]rotica . . . does not appear to affec signifi-cantly the behavior of sex offenders." 24

Careful review of Dr. Abel's results and of his ora testimony, however, tends significantly to undercut tha assertion. To begin with, the mean number of sex crim committed by users of erotica was 29 percent higher than the me for nonusers. Dr. Abel lists the difference as "not significan but does not supply a "p value"; we thus cannot gauge what t

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24 Abel (1985) at 5.

actual probability is that the difference is explained only by chance.[25] The finding of no significance is particularly puzzling because, according to Dr. Abel's other findings, users of "erotica" commit the same number of sex crimes per month (actually 21 percent more, but once again the difference is listed as "not significant") and maintain their paraphilia for more total months. Mathematically this would seem to compel the conclusion (already suggested by the statistics on "mean number of sex crimes") that by the end of their paraphilia, the group using "erotica" will have committed more total sex crimes than nonusers. That indeed seemed to be the gist of his oral testimony, where he explained the "price" paid by sex offenders who use "erotica" to reduce their desire to commit sex crimes:

> . . . when you use the deviant fantasy in order to ejaculate, instead of attacking a kid or raping someone, it does transiently stop you from carrying out that behavior. In many cases, that is the case, but it's a transient phenomena. And in so using that tactic, the price you pay is maintenance of your arousal. That is your arousal stays strong and will get a little stronger. So over time you are more likely to maintain your arousal over a longer period of time, that means

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[25] Dr. Abel has been asked to furnish the exact "p value" for this and other comparisons in his written testimony. For our purposes the appropriate level of "significance" in a matter such as this might be substantially different from that typically used in the social sciences. There a statistical difference between two groups is normally not described as "significant" unless there exists 95 percent probability that it did not occur by chance. The probability level appropriate for our use - which, after all, is only to determine whether a "substantial basis" for a finding exists - might be as low as 70 percent.

you can commit more acts. 26

In view of these internal tensions, Dr. Abel's results a extremely difficult to use in their present form.[27] They se clearly to indicate, and Dr. Abel said as much, that use "erotica" by sex offenders (outside a treatment setting) is n "helpful."[28] On the other hand they do not seem to rule ou Dr. Abel's protests to the contrary notwithstanding, t possibility of some important statistical relationship betwe use of sexually explicit materials and commission of sex crim by this population.

The possibility of such a relationship is clearly enhanc by several other relevant studies. Thus Dr. William Marsha (1985) found in an outpatient study that a far higher percenta of sex offenders currently use "hard-core" pornography than do group of demographically similar "normals." Professor Dia Russell found high correlation in her study of 930 random selected adult women: a surprisingly high number of wom victimized by wife rape and stranger rape who said pornograp

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[26] Houston Tr. 100. Earlier Dr. Abel has said the use erotica by sex offenders "maintains their arousal over time, therefore greater opportunities to commit further crimes occu Id. at 88.

[27] Because of his limitation of his study to the role "hard-core pornography" (not including the typical "adu magazines" referred to by Dr. Abel in his study) Dr. Marshal results are in no sense directly comparable to those of Dr. Ab He does, however, find a pattern of pornography being used integrally in preparation for and commission of sex offenses to make his evidence highly pertinent.

[28] Id. at 97, 100.

had played a substantial role in the event. A similar survey of 200 prostitutes by Silbert and Pines (1982) found that 24 percent of the large number who had been raped "mentioned allusions to pornographic material on the part of the rapist" - this without any questioning or prompting by the interviewer. Law enforcement witnesses we have heard have also consistently stated that pornographic materials are routinely found on the person of, or in the residence of arrested rapists. While all of this is, like Dr. Abel's evidence, "merely" correlational data, it suggests reason for further inquiry and research on the use of sexually explicit nonviolent materials by sex offenders.

4. Conclusions from Correlational Evidence. An overview of "correlational" evidence available to us ultimately leads to only one firm conclusion. A highly significant, and not obviously spurious statistical relationship exists in the United States between state "adult magazine" circulation rates and sexual violence. That relationship may be explained by a causal connection or it may not; only careful attention to other forms of evidence can indicate which explanation is more plausible. Because "adult" magazines contain relatively little violence,[29] their connection (if one exists) to rape rates makes an excellent "test case" for considering the possible effects of the broader class of nonviolent but sexually explicit materials.

No clear statistical relationships exist, on the other hand, between cross-cultural measures of rape and sexually explicit materials, although such measures if anything tend slightly to support some relationship between the two. Nor is there undisputed evidence regarding the correlation of "erotica" use by sex offenders and commission of sex crimes; it is at least strongly arguable, however, that such a relationship exists. Other sources of information may prove more informative in evaluating these ambiguities.

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[29] Malamuth & Spinner (1979) (sexually violent content in Playboy and Penthouse from 1973 and 1977, amounted to less than 10 percent of total cartoon and pictorial content).

C. Experimental and Clinical Evidence. A "causal" connection between circulation of adult material and sexual violence may only be inferred if one or more plausible explanations exist for how such "causation" could exist. Experimental evidence is particularly important in testing the likelihood of such causal links; as noted above, however, ethical and practical constraints insure that such evidence will always be open to charges of artificiality and obliqueness.30 Simply put, actual rapes cannot be staged in the laboratory, nor can known rapists be subjected to testing which might provoke future violence. Retrospective "clinical" evidence, although it does generally relate to "real" rapes by "real" offenders, has the even more

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30 Thus Gross (1983) has criticized the research of Zillman and Bryant (1982) because he suspects the subjects "were giving the researchers what they thought they wanted." Id. at 111. This, despite the elaborate efforts of the researchers to deceive the subjects into believing that they were most interested in aesthetic qualities of materials viewed, rather than their efforts on attitudes. Unfortunately Gross' criticism may be applicable to virtually any experiment in this area, or indeed in other areas of inquiry. And he is unable to suggest any way to surmount the artificiality inherent in laboratory experiments.

crippling handicap of relying on faulty, and self-serving, memory. Yet experimental and clinical evidence remain in this area the most effective tools for testing the "validity" of correlational data.

Searching the evidence for suggestions of a "cause-and-effect" pornography/rape connection inevitably leads down two different paths. The first observes the capacity of pornography to effect arousal in the viewer, and examines whether such arousal can be causally linked to sexual violence. The second, somewhat more indirect approach examines the effects of pornography consumption on viewer's attitudes, then considers whether such changes in attitudes could plausibly affect the incidence of rape.

1. Arousal. One of the few undisputed properties of sexually explicit materials is their capacity to cause sexual arousal in many, if not most viewers.[31] One strand of experimental research has attempted to determine whether this arousal, alone or in combination with other factors, increases or decreases aggressive behavior in laboratory settings.

a. "Normals". With regard to "normal" subjects (usually college-age male volunteers), the results have been mixed, or at least highly complex. Thus highly arousing erotic materials, when combined with prior or subsequent anger, seem clearly to provoke heightened aggression by males against males.[32] But in a recent review of the research Professor Donnerstein made the following, more limited, statement about the effects of exposure to nonviolent pornography on male aggression toward women.:

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[31] See e.g., Donnerstein (1980); 1970 Commission Report at 198-241.

> . . . The question of whether or not nonaggressive pornography has an influence on aggression against women is not simple to answer. For one thing, there is not that much experimental research on the topic. Also, studies investigating this issue have differed in many ways . . . . These studies indicate that under certain conditions exposure to pornography can increase subsequent aggression against women. What seems to be required, however, is a lowering of aggressive inhibitions. This change in aggressive predisposition can come about in a number of ways. First, a higher level of anger, or frustration, than that exhibited in a laboratory setting could influence the effects of pornography on aggression against women. There is no question that such levels are present in the real world. Second, as mentioned earlier, drugs, alcohol, and other aggression disinhibitors very likely increase aggressive response to pornography. The main mediating factor, however appears to be the type of material viewed prior to an aggressive opportunity.[33]

While experimental findings are neither conclusive nor absolutely consistent, the bulk of research to date supports the conclusion: that where highly arousing nonviolent pornography is viewed in a context of anger or provocation, aggressive behavior against women increases. Outside the context of provocation, in Professor Donnerstein's view, nonviolent material which is "either mildly arousing or leads to a positive affective reaction" does not appear to increase subsequent aggressive behavior, while that which depicts "unequal power relationships with women" or "women as sexual objects" may provoke such behavior. As part of his belief that the issue warrants "much more investigation" he notes that the effects of nonaggressive pornography may not occur with only a single exposure,[34] which would explain varying results in experiments based on single exposure. Growing habituation to standard "pornography" over the years among likely experimental subjects may substantially affect the results of research.[35]

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[32] Donnerstein (1984); Donnerstein (1983b); Sapolsky (1984).

[33] Donnerstein (1984) at 62.

b. Sex Offenders. Along slightly different lines, a certain amount of experimental and clinical evidence suggests that rapists are aroused by nonviolent, sexually explicit materials, and that some consciously use such materials to prepare for and execute sexual violence. Thus rapists are normally as strongly aroused to consensual nonviolent pornography as nonrapists; they are, moreover, at least as aroused to images of mutually consenting sex as they are to those of rape.[36]
Does this arousal to mutually-consenting imagery cause some of them to commit sex crimes which they might otherwise avoid? Evidence from at least Dr. William Marshall suggests that the answer may be yes: 33 percent of rapists interviewed for his study "had at least occasionally been incited to commit an offense by exposure to one or the other type of pornography

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[34] Id. Compare Check (1985) with Linz (1984). For further discussion of varying research results see, supra note 22.

[35] See, Saplosky (1984) at 92; Wolchik, Braver & Jensen (1985).

[36] Barbaree, Marshall & Lanthier (1978); Abel, Recker & Skinner (1980).

pages tightly bound

specified in this study."[37] Of that group 75 percent reported that they had at least occasionally used 'consenting' pornography to elicit rape fantasies which in turn led to the commission of a rape (or an attempt at committing a rape)."[38] A large number of other rapists in his sample used "consenting pornography" to "evoke rape fantasies" and consequent arousal. Indeed, fully 52 percent of the rapists in his sample (as compared to none of the "normals") used pornography "always" or "usually" during masturbation.[39]

Dr. Abel, while stating the belief that direct incitement to rape can be traced to sexually explicit depictions only in "exceedingly rare" cases, also found that a very high proportion of rapists use consenting "erotica" to elicit and maintain deviant arousal. Recent research has shown a high correlation between sexually deviant fantasies and deviant behavior,[40] and many treatment programs for rapists have been predicated on altering their deviant behavior through changing their fantasies and arousal patterns.[41] Dr. Abel and his colleagues at one point called for recognition of "fantasy as the pivotal process leading to deviant behavior."[42] To the extent that nonviolent, "consensual" pornography contributes to provoke or maintain deviant fantasy and arousal in rapists, it may be considered a "cause" of their deviant behavior.

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[37] Marshall Statement at 23.

[38] Id.

[39] Id.

[40] Marshall (1984); Abel, Roulean and Cunningham-Rathmer (1985).

[41] Abel, Blanchard & Jackson (1974); Marshall (1973); Marquis (1970); Davidson (1968).

c. General Population. Turning back to the general population - that is, both sex offenders and "normals" - it is important to note two significant theories concerning sexually aggressive behavior which are predicated on the biological forces of simple arousal. The first, called the "general emotional arousal theory," is described in one study as predicting that "by arousing either the sexual or aggressive drives in an individual, the overall general level of arousal would be increased, thereby making both sexual and aggressive responses more probable."[43] The second theory, which is more subtle and more flattering to the human will, adds an additional cognitive layer to the general-arousal theory:

> While evolutionary forces may have provided a biological basis for a link between sex and aggression, it is our contention that learning variables may accentuate or attenuate this relationship. We hypothesize that in human beings the biological link plays a relatively minor role and that to a large extent the relationship between sexual arousal and aggression is mediated by learned inhibitory and disinhibitory cues. [44]

Both theories associate arousal with aggression; the second merely adds the additional mediating factor of "learned inhibitory and disinhibitory cues." If this association is ultimately found valid, then a "casual" connection between circulation of highly arousing sexually explicit materials and the incidence of rape would be both clear and easy to explain: more sexual arousal in society (as a consequence of pornography) inevitably produces more sexual and more aggressive behavior, both of helpful and harmful varieties. If viewing sexually explicit materials cause Americans to have more sex, then some of that incremental sexual behavior will be of a sexually aggressive nature. The "rate" of rape as a percentage of all sexual intercourse will not change,[45] but the absolute number of rapes, and the number of people victimized by rape, will increase.[46]

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[42] Abel, Blanchard & Jackson (1974), at 474.

[43] Abel, Becker & Skinner (1980), at 138. See e.g., Saplosky (1984).

[44] Malamuth, Feshback & Jaffe (1977); Donnerstein, Donnerstein & Evans (1975).

The ability of sexually explicit materials to arouse those who view them may, therefore, be in itself a "cause" of sexually aggressive behavior - perhaps simply for rapists, or perhaps in a more general way. This evidence does not distinguish sexual material as being more culpable than, say, alcohol as a causal factor in rape - but it does suggest that the more highly arousing the material is, the greater will be its ultimate effect. Thus highly explicit sexual material will likely have more of an impact than material which is less sexually arousing. The evidence does not indicate, moreover, that "learned" cultural mores and social attitudes have no effect on preventing rape; rather, those factors may play a significant role in mediating the negative biological forces that push men toward rape.

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[45] Rape statistics, of course, measure only the number of such acts, and the "rate" of such acts for a constant population group. They do not, and cannot, measure rape as a percentage of all sexual behavior.

[46] Some general support for this hypothesis may be found in the fact that as rape dramatically increased in incidence in post-war America, so did sexual activity among the young - the age group most prone to sexual violence. Thus only about one-half of males 21 years of younger had engaged in sexual intercourse at the time of the first Kinsey study. A. Kinsey, *et al.*, *Sexual Behavior in the Human Male* 316, while currently over 90 percent of boys appear to have begun such activity by age 17. R. Coles & Stokes, *Sex and the American Teenager* 73 (1985) (The Coles & Stokes sure is somewhat ambiguous on this point; in another table the percent of 18 year olds "having had intercourse" is listed at 46 percent. *Id.* at 73. In any case the trend toward earlier and greater sexual involvement is clear, for in Kinsey's survey only some 31 percent of all 18 year-old males had experienced sexual intercourse. Kinsey, *supra*, at 316.

2. Effects on Attitudes Toward Rape - "Disinhibition". If arousal to rape is mediated by learned attitudes, however, a change in those attitudes may in itself change the likelihood of rape occurring - may become a "cause" of sexual violence.[47]

Thus it is crucial to consider what the available experimental evidence shows about the effects of viewing nonviolent sexually explicit materials on attitudes toward women and toward rape. Although Professor Neil Malamuth and others have examined in some depth that question with regard to sexually violent materials, only very recently has substantial evidence emerged about materials which are similar to much of what is contained in the "adult magazines" examined by Baron and Strauss.

Despite some surface tension in the results, that evidence strongly suggests that such materials, when viewed in substantial quantities over extended periods of time, tend to increase callousness toward women and acceptance of "rape myths". Thus six hours of viewing "commonly available [nonviolent] pornography" over a six-week period caused men in several experiments to become more accepting of "gender dominance"[48] and "sex callousness" - to trivialize rape, and to discount the trauma suffered by its victims.[49] The careful and extensive study by Professor James Check found repeated exposure to the "most prevalent" form of nonviolent pornography currently available - that depicting the women subjects in a "dehumanized fashion" - had even stronger effects on subjects' "reported likelihood of rape" and "reported likelihood of forced sex acts," than sexually violent materials.[50] Both types of material had particularly profound effects, it is important to note, on those subjects with higher tendencies toward psychoticism.[51] Exposure to "nonviolent erotica" - described as being the type of depiction used in sex education and therapy materials - was found to have at best an ambivalent effect: likelihood-to-rape scores increased among those viewers to a level where they were not significantly different from either those in the "no exposure" or the "dehumanizing pornography" groups.52

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[47] See generally, Malamuth (1984).

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[48] Zillman & Bryant (1985b).

[49] Check (1985), Zillman & Bryant (1982, 1984); Donnerstein (1984).

[50] Check (1985), at 49.

[51] *Id.* at 53. Indeed, subjects with "low P" scores were not significantly affected by *any* of the sexually explicit materials, a finding which *may* call into question flat conclusions about the effects of pornography independent of the specific vulnerability of individual subjects, and which supports the role of a well-developed moral sense in mediating the effects of exposure.

Only one study currently extant seems to cast doubt on the tendency of viewing nonviolent pornography to increase "rape myth acceptance." In a recent doctoral dissertation Daniel Linz found that exposure of university psychology students to either two or five full-length X-rated nonviolent films over, respectively, a three- or ten-day period did not affect their attitudes toward a rapist or his victim in a simulated rape trial shown two days after exposure was completed.53 Such attitudes were dramatically affected, by contrast, in a comparison group observing four extremely violent R-rated films with far less sexual content. Unfortunately, Linz' study is not directly comparable with previous ones in this area. First, Linz limited the time frame of exposure to less than two weeks.[54] Second, his study did not measure the subjects' scores on "likelihood-to-rape" or "likelihood-of-forced-sex-acts" scales similar to those used by

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[52] Id. at 49, 53. It is notable that on the three measures of sexual violence in which no-exposure and "violent pornography" scores were significantly different, the "erotica" scores were slightly closer to those of the latter. Professor Check thus seems to have overstated the importance of his findings that "erotica" and "no exposure" scores were not "statistically significant".

[53] Linz (1985).

[54] Zillman and Bryant (1982, 1984, 1985), by contrast, used a six-week exposure model. Check (1985) used a time frame similar to Linz, but tested for prior consumption of pornography - finding that only those viewers with high previous consumption were affected by exposure to new materials. Thus the negative findings of Linz may well have to do with low prior exposure to pornography among his subjects - precluding, in the short time used, development of the effects of long-term exposure. See, infra text to note 57.

Professor Check but rather studied subjects' reactions to a simulated rape trial. Reaction to the plight of a specific rape victim in a simulation is not as direct - and so at least arguably not as useful - a measure as answers to questions about what the subject himself desires to do. Because his study did not include, as did Check's, comparisons based on his subjects' prior viewing habits, Linz' results must be treated with extreme caution. It is possible that the strong reaction to R-rated violent films was simply a function of low prior exposure to those films - the films may have their effects because of "shock value."[55] (College-age participants in studies of this nature are known, by contrast, to have previously seen large quantities of "commercialized erotica" and so would not likely have been as jarred by seeing more of it.)[56] The study did not measure the effects of X-rated violent films, which would have served to indicate the role of sexual explicitness in mediating the effects of viewing violence.

Despite its methodological limitations, the Linz dissertation does contribute one highly important finding to the data on non-violent material. In a follow-up study of the participants in his experiment Linz conducted careful "debriefing" of all subjects with regard to the specific material each had seen, then measured their attitudes toward rape after a six-month period. For those subjects who had seen, then been "debriefed regarding R-rated violent and R-rated nonviolent materials, a dramatic reduction in "rape myth acceptance" occurred - with virtually no difference between those two groups in their final scores. "Debriefing" was thus seen as a success for both groups. Subjects who had seen X-rated nonviolent materials, by contrast, showed only the most minimal decline in "rape myth acceptance" after "debriefing" the lapse of six months - so that at the point of follow-up measurement they showed substantially higher toleration of rape than either of the R-rated groups.[57] The significance of this finding, not recognized by Linz himself, is its tendency to show long-term effects of "X-rated" material even in the face of positive efforts to "educate" viewers. In the "real world", as opposed to the laboratory, viewers of sexually explicit materials normally receive messages - "inhibitory cues" - contradicting those in the materials they watch. The Linz study provides tentative evidence that for sexual materials with a high degree of explicitness, such real-life "debriefing" may be unsuccessful.

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[55] See, Zillman, Bryant & Carveth (1981) (viewing bestiality increased aggression due to "annoyance summation"). The shock value explanation for the Linz data is strengthened by the fact that later "debriefing" treatments over a six-month period seemed completely to reverse the effects of viewing these materials. Linz at 96.

[56] Wolchik, Beaver & Jensen (1983).

The overall results of work on "long-term" exposure to standard, nonviolent pornography was confirmed and summarized in a statement by Professor Donnerstein in 1983:

> Let me end up talking in the last couple of minutes, about the long term research. Researchers like myself and Neil Malamuth at UCLA are looking at massive long term exposure to this material.

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[57] Linz (1985), at 96-98.

> Some interesting things occur. If you expose mal
> subjects to six weeks' worth of standard hard-cor
> pornography which does not contain overtly physic
> violence in it, you find changes in attitudes tow
> women. They become more calloused towards women.
> You find a trivialization towards rape which mean
> after six weeks of exposure, male subjects are
> less likely to convict for a rape, less likely to
> give a harsh sentence to a rapist if in fact
> convicted.[58]

Professor Donnerstein went on to say:

> In our own research we are looking at
> the same thing. Let me point out one thing. We
> use in our research very normal people. I keep
> stressing that because it is very, very important
> What we are doing is exposing hundreds and hundre
> of males and now females to a six-week diet of
> sexually violent films, R-rated or X-rated or
> explicit X-rated films. We preselect these peopl
> on a number of tests to make sure they are not
> hostile, anxious or psychotic.
>
> Let me point out the National Institute of
> Mental Health and the National Science Foundation
> and our own subjects committee will not allow us
> to take hostile males and expose them to this typ
> of material because of the risk to the community.
> They obviously know something some of us do not.

Although Professor Donnerstein himself has recently e
most the harmful effects of violent depictions, th
strongly seems to support the proposition that lon
substantial exposure to "standard" nonviolent, sexuall
materials acts as a "disinhibiting cue" for rape.

3. Overall Evidence for "Causation". No experi
for the reasons suggested by Professor Donnerstein, t

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[58] Public hrgs. on Ordinances to Add Porno
Discrimination Against Women, Minneapolis City Council
31 (Dec. 12, 1983).

[59] Id. at 32.

effects of nonviolent, sexually explicit material on the aggressive behavior of known sex offenders or, indeed, those with even a tendency toward psychoticism. Experiments with "normal" subjects, however, have suggested two separate, but quite possibly interdependent means by which such material could heighten the probability of sexual violence. The simple capacity of nonviolent material to produce strong arousal in both offenders and the general population may in and of itself produce higher levels of sexual violence. Of equal importance, "standard" commercial pornography may over time and with significant exposure work to undermine "learned" inhibitions against sexual violence. While "adult men's magazines" have not been the normal focus of experimental investigation, the material they contain is sufficiently arousing, and sufficiently tied to views of women only as "sexual objects," as to make the reasonable inference that these findings are applicable to them as a class. Thus the Badgley Committee in Canada found that in a group of "adult" magazines essentially the same as those studied by Baron and Strauss, photographic depictions of sexual bondage were three times as frequent as oral-genital contact, five times as frequent as vaginal penetration with penis or finger, and ten percent more frequent even than any form of kissing.[60] While further research is clearly indicated to determine the effects of this extremely common material, at present it may fairly be seen as falling within the range of materials as to which current experimental and clinical evidence is highly relevant.[61]

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[60] Badgley Report at 1223. Of course graphic depictions of genitalia of nude models in such magazines - often with pubic hair shaved - serves as well to reduce those shown to the status of "sexual objects". This general description of magazines evaluated by Baron and Strauss and others should not be taken as specific to any one of them. Individual differences in format, and style and content may be crucial.

D. Evidence Against Causation. Studies of both arousal and attitudinal effects of viewing nonviolent materials thus provide several suggestive "causal" links between such viewing and sexual violence. What is the evidence *against* such a connection? If substantial enough, such data might preclude forming any opinion about the plausibility of the causal link suggested by the correlational data, in combination with indirect experimental and clinical data.

Unfortunately evidence which contraindicates the existence of a cause-and-effect relationship between nonviolent materials and sexual violence is slim. Short-term exposure of *normal* subjects to "mild erotica" has been shown to have negligible (and in some cases positive) effects on aggressive responses toward women in the laboratory.[62] As discussed above, results of short-term exposure to highly arousing material have been to the contrary, with enhancement of aggression occurring in cases with "prior anger."[63] Long-term exposure, however, which seems the condition most likely to resemble actual behavior, seems clearly to disinhibit subjects regarding sexual violence. And of course, the reaction of paraphiliacs even to brief exposure to "mild erotica" is far from clearly negligible; if anything, the studies point toward some use of such material by sex offenders to initiate and maintain the deviant fantasies which help push them toward more offending behavior.[64]

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[61] Thus Abel (1985) focused on such material in his study of sex offenders. As discussed above, *supra* text to notes 21-23, Dr. Abel's findings are ambivalent but troubling.

[62] *See* Donnerstein (1984, 1980A).

[63] Donnerstein & Hallam (1978).

Nor is there substantial evidence showing beneficial effects of "standard" nonviolent pornography. It is crucial to note that when asked whether exposure to pornographic materials can ever reduce commission of sex crimes by paraphiliacs over the long term, Dr. Abel responded with a flat denial.65 The Fraser Committee found, on a more general level, "there is no research documenting the beneficial effects of pornography," a proposition that is somewhat misleading but generally true. In sex therapy and sex education settings, research by Dr. Abel 66 and others suggest that such material may be useful, and the work of Professor Check, discussed above, indicates that materials which are overtly educational or therapeutic may be substantially "harmless" even when viewed outside a controlled environment. Studies for the 1970 Commission found that some sexual materials helped ease sexual tension and promote "liberal" attitudes toward sexuality - a result that may be seen as "beneficial" according to one's basic assumptions regarding sexual morality. Yet with regard to strongly arousing, nonviolent materials, both Dr. Abel's judgment concerning sex offenders and the Fraser Committee's findings about the general population seem well founded.

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[64] For a discussion of the evidence on sex offenders presented by Dr.Abel and Dr. Marshall, see, supra text to notes 21-24, 34-40.

[65] Houston Tr. 100.

[66] Fraser Report at 98.

## III. Conclusion

Ultimately the empirical evidence suggests the following conclusions: viewing nonviolent, sexually explicit material similar to widely circulated "adult magazines" is statistically related to a higher probability of rape. (Thus, for example, Wyoming has a "sex-magazine circulation rate" 45 percent higher than Montana's, with a rape rate 57 percent higher. Baron & Strauss (1985).) That relationship is not only highly significant, and constant from year to year, but it is not "spurious" when other potential "third factors" are considered. Evidence from both experimental and clinical studies demonstrates at least two possible ways in which that correlation might be explained by "causation": (1) through the simple arousal properties of such materials, and (2) through their disinhibiting qualities, their capacity to change attitudes regarding sexual aggression. The evidence is nonetheless far from conclusive, and points toward the need for substantially more, and better-focused research. At this point, little or no evidence exists which shows any beneficial effects of such materials.

It is useful to consider the weight of this data against that which supports our previous finding that *sexually violent* material is causally related to sexual violence. For that conclusion we had *no* correlational evidence demonstrating a "real-world" statistical relationship between the material and the behavior. By contrast, the experimental evidence was somewhat stronger - showing, for example, "negative effects" from short-term as well as long-term exposure. Sexually violent material is no more *arousing* to viewers (even to known rapists) than is "standard" nonviolent material. (Abel, Barlow, Blanchard & Guild (1977) In the one study which directly attempted to compare the effects on *attitudes* of sexually violent material with effects from "dehumanizing" material and "erotica," the results showed no significant difference in the most crucial areas.[67] Only a well-founded intuition that direct depictions of sexual violence are more likely to produce such violence allows us to conclude that they are more "harmful" than non-violent materials; the evidence from social science is at best ambivalent on the issue.[68] Our task is not an easy one, because with widely different backgrounds and substantially different ideas about what constitutes "proof" of a given fact, we are highly unlikely to reach consensus on highly disputed questions. With regard to the relationship between sexually explicit materials and sexual violence we will each carry away different levels of skepticism about the state of currently available evidence. And we will know, too, that our stated conclusions may be swept away by new research. Yet that does not relieve us of the obligation to state, not as scientists proclaiming "fact" but as policymakers confronting risk and probability, that wide circulation and consumption of materials similar to "adult men's magazines" must be a matter of concern among those seeking to combat sexual violence. There is at least a substantial basis,

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[67] Check (1985). Indeed, Check found that on many measures sexually violent materials produced less "negative effects" than "dehumanizing pornography" - although not by "significant" margins. "Erotica", of course, was also found not to be "significantly" different in its effects than "no exposure". *See*, *supra* note 52.

[68] It is useful, as well, to compare the strength of our conclusions in this area with those of the Advisory Committee to the Surgeon General in an area which was at the time similarly contentious and difficult - the health risks of cigarette smoking. The evidence relied on for the Committee's conclusion was overwhelmingly correlational - showing higher death and illness rates among smokers than in non-smokers. The Committee recognized fully that correlational evidence did not show causality and looked to animal experiments, clinical data, and

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"population studies" (*i.e.*, retrospective studies of smokers vs. control groups). *Surg. Gen'l of the Pub. Health Serv., U.S. Dept. of H.E.W.* 26-27 (1964). With regard to lung cancer, those additional forms of evidence were sufficiently supportive of the correlational data to allow the Committee to conclude that "[c]igarette smoking is causally related to lung cancer in men"; with regard to women the data allowed the lesser conclusion that the data "point in the same direction." *Id.* at 31. As for heart diseases, the Committee found that there existed a strong correlation between coronary disease and smoking, but found that the current explanations for causation from experimental and other evidence "do not account well for the observed association". *Id.* at 327. Instead of throwing up its hands in the face of difficult and conflicting evidence the Committee said simply: "It is...more prudent to assume that the extablished association between cigarette smoking and coronary disease has causative meaning than to suspend judgement until no uncertainty remains." *Id.*

It would be presumptuous to compare the quantity of evidence before us with that reviewed by the Surgeon General's Committee; research on "pornography" is still in its infancy. But our responsibility to be as prudent as possible is the same, and the correlational evidence before us combined with at least a substantial strain of experimental and clinical data make it *prudent* to advise the public of the risks of the materials for which statistical data do exist.

if not a preponderance of the evidence, to believe that such naterials are a part (if only a small part) of the explanation for that cruel plague.

## Acknowledgement

I am deeply grateful to Dr. Edna Einsiedel, The Commis-
ion's staff social scientist, for her review of, and comments
n, the preliminary versions of this statement. The foregoing
epresents, however, only my own views and not necessarily hers.

* * *

All references in the text and notes are to studies cited in
he Report on Social Services of the Commission, except where a
ll citation is given.

Personal Statement of Commissioner Frederick Schauer.

Pornography, in its most explicit and offensive forms, commands our attention in a way that few other things do. It is there, before our eyes, and in our minds thereafter, and its very thereness makes it hard to ignore it and hard to be dispassionate about it. Most importantly, the way in which the pornographic item demands our attention makes it hard to generate that level of detachment that, however personally difficult, is an essential prerequisite of open-minded and intellectually honest inquiry. The eleven of us find ourselves on this Commission for different reasons. Although I consider myself as moral as the next person, and more moral than most, I do not deceive myself into thinking that my appointment to this task was a function either of my own morality or of my ability to identify, to reflect, or to speak for the moral values of others. These are important functions, and I am gratified that they have been represented on this Commission, but I have seen my own role differently.

As a teacher in a university, as an academic, and as a scholar, I have been asked to bring to our work some degree of knowledge about constitutional law in general and the law of free speech in particular, as well as some knowledge about the law of obscenity. But to be an academic is not to know about certain things, or even to have certain talents of intelligence, analysis, or creativity. Nor is it to hold an appointment in a university, for it is more than that. It is to be willing to pursue an inquiry in the most intellectually honest way possible, to be open to new ideas and to challenges, to follow the inquiry where it leads regardless of personal views, to be free to reach conclusions without having to serve an external constituency, to be able to make the best case for the opposing view and then confront that best case rather than the worst case, and to be willing to consider today that what one believed yesterday might be wrong.

This is an ideal, and it is an ideal that none of us reach. But it is the ideal that I take to have guided my aspirations for the work of this Commission, and especially to have guided my aspirations for my own role among the Commissioners. As I look back on what we have done, I am pleased with the way that our final product measures up against this standard. We have dealt with issues that have divided us, and that divide society, yet we have been able to agree on a great deal, we have been able to talk even where we have been unable to agree, and we have been able to put together a final report that explains rather than suppresses disagreement.

In their own statements the other Commissioners have concentrated largely on the issue of pornography, and on their reactions to it. I believe these issues are important, or else I would not have agreed to serve on this Commission, but for me what is even more important is the nature of the inquiry and the nature of the product, and what it says about the style and level of public discourse. It is not a necessary truth that the world has to be divided into liberals and conservatives, good guys and bad guys, reactionaries and radicals. Nor is a necessary truth that adjectives must substitute for analysis, that all that matters is what can be summarized in a headline or a three minute news segment, and that one good quote is better than a hundred pages of careful thought. To me our process and our product is a rejection of much that is worst about the nature of public discourse. It trusts the public to understand difficult issues if the various positions can be explained. It trusts the public to read and to understand a large amount of factual information. It records agreement where it exists without exacerbating minor differences, and it records disagreement where it exists without feeling compelled to reduce every serious disagreement to who won and who lost. It is a report that is designed to be read rather than summarized, to be thought about rather than used as rallying cry or flag of battle, and to be as much the beginning of serious discussion and debate rather than the end of it.

None of us can be expected to agree with every word, every line, every fact, and every recommendation contained in these pages. Discussion has resolved many of our differences, just as it has created new ones. Yet we expect to continue thinking about this issue, just as we expect others to. We deal here with an issue that involves sex, physical harm, privacy, morals, the environment of a community, the idea of community itself, the status of women, sexual preference, and a host of other issues that divide this and other societies. Faced with these divisions, we could have yelled at each other, chosen up sides, and looked for further reasons to disagree. But the world has no shortage of people who are looking to create or to accentuate ivisions. It does need people who are willing to try to heal hem, not by trying to persuade other people to adopt your point f view, but instead by reaching out and trying to understand heirs. We have tried to do this, and we have succeeded more han most. This Report contains a great deal on the issue of ornography, and there seems little point in adding to that ere. But in thinking about pornography, this Report also says omething about thinking, and I hope that part of our mission and r product will not be neglected.

## Statement of Deanne Tilton-Durfee

My entire adult life has been spent in the field of child welfare and child protective services. As a result, my perspectives on the effects of pornography have been primarily focused on how these materials affect children and their families. However, in the course of the past year, it has become necessary to expand the boundaries of my concerns to include co-related issues such as adult victimization in the production, behavioral effects from the consumption, and crimes related to the production and consumption of pornography. Moreover, because a credible analysis must be a balanced one, I have found a critical need to weigh carefully the impact of any recommendation that might threaten the integrity of the First Amendment or unnecessarily limit choices available to the American public.

I have no doubt that there is very real harm resulting from the production, distribution and consumption of some pornography. Quite understandably, the nature and degree of the harm has been difficult to define. It is possible that establishment of a cause and effect relationship has and always will be an impossible task, given the human variables involved. In any case, it is clear that harms or benefits from consumption cannot be generalized accurately in that reactions to explicit materials will depend on the basic attitudes, situations, self-concepts, mental health, support services, and personal and sexual opportunities available to each individual consumer. Certainly, mere exposure to pornographic materials does not create criminal behavior. More than one observer of our Commission's work has noted that such a connection would render each Commissioner a potential sexual deviant.

It is therefore important to acknowledge that we cannot scientifically show that exposure to sexually explicit materials affects the behavior of most consumers. It is also important to acknowledge that we have no business regulating any expression in words or pictures without good cause. We do, however, have an obligation to protect those who are vulnerable to victimization, to prevent and deter crimes committed in the production or distribution of pornography, and to provide methods by which communities can preserve the quality of their neighborhoods.

## CHILD VICTIMS

I wish to focus on the victimization of children for several reasons. First, because this is my area of expertise, second, because I believe children are often given patronizing support but little genuine respect as valuable members of our society, and third, because children are clearly the most vulnerable of all who may be affected by pornography. This is not only because of their developmental limitations, but because there is an assumption that parents or other trusted caretakers can and will protect them. Moreover, I believe that the roots of so much of the demand for pornography and the exploitations in the production and forced consumption of pornography lie in the childhoods of those involved.

Because children are such defenseless and quiet victims, and because those who exploit them seem rarely to meet the public stereotype of the "child molester," the very existence of child sexual exploitation has been the very slowest of all offenses to emerge. There is a profound reluctance on the part of the American public to respond to this tragic dilemma. This relates to a disbelief that this kind of thing could happen, a lack of confidence in resources available within the various social and legal service systems, and the suppression of painful memories on the part of adults who themselves suffered as child victims and who were neither believed nor rescued.

As our social and legal systems have responded to the emerging revelations regarding sexual exploitation of children, a common trend has been that the ages of the victims have become younger and younger. Although we had begun to acknowledge the reality of the exploitation of adolescents in the production of pornography, we found that pictures of pre-pubescent children, toddlers, and even infants in sexually explicit depictions became increasingly prevalent. This trend toward the inclusion of very young children in pornography correlates with an identical trend in the physical abuse and sexual exploitation of children throughout the country.

Recently, communities throughout the United States have been shaken by disclosures of major multi-victim and multi-perpetrator child sexual molestations within preschool settings. From one end of the Country to the other, children are coming forward as young as three and four years of age to relate stories strikingly and frighteningly similar regarding the most cruel and perverted sexual abuses imaginable, perpetrated by trusted caretakers and responsible members of the community.[1] Each time one of these cases emerges, the local community and its social and legal systems are so overwhelmingly shocked and incredulous of what they are hearing from these tiny youngsters, the process of intervention and prosecution is awkward, and usually unsuccessful.

One common theme that emerges repeatedly is the statement by the children that their pictures have been taken in sexually explicit poses while involved in perverted sexual activities. Other children have spoken of boxes of pictures being carried away just prior to police searches. In my opinion, there is little doubt that there is a connection between the ritualistic molestation of the children involved in the many alleged preschool multi-victim, multi-perpetrator molestation cases, and a child pornography market. However, since we have failed to discover pictures to substantiate this belief, the existence, nature, extent and those responsible for this market have not been determined. The recommendation for a national task force to study possible relations between these preschool sexual rings and an organized child pornography market is what I consider one of the most significant recommendations in this report.

Many other recommendations included in the Child Pornography section are particularly encouraging including those which strengthen support services for the child victims, sensitize and improve the effectiveness of legal/judicia procedures to accommodate the child victim, and those whic provide children with information and skills to protec themselves against those who might exploit them, whether or no the perpetrator is a stranger, trusted adult or a parent.

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[1] Roland Summit, M.D. Too Terrible to Hear, November 20, 1985.

FAMILY LIFE EDUCATION

I truly believe that a significant measure in th protection of children and subsequent generations agains exploitation lies in the incorporation of family life preparatio programs within school systems. This is a concept which wa opposed by some of my fellow Commissioners, and certainly by many parents in the general public. However, the challenge of raisin healthy children is perhaps the most significant task that wil be faced by the largest number of students in American schools. large percentage of children who become involved in pornography and prostitution have run away from violent or exploitive homes.[2] Most reported child molestation is perpetrated by a family member.[3] In other words, if we depend completely on parental guidance, many children will never receive the benefit of information regarding their rights and responsibilities in making personal choices and the requirements of healthy parenting. Other children's own healthy experiences at home can be enhanced by age appropriate curriculum which clearly must respect the role of parents in determining life styles, cultural practices, and religious preferences. It seems incredible to me that we are unwilling to focus concern and educational resources on promoting healthy parenting and inter-personal skills at a level commensurate with our commitment to other curricula which may be of far less importance in the lives of future generations.

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[2] UCLA Bush Foundation Report. Status Offenders in Los Angeles County, Focus on Runaway and Homeless Youth (1985).

[3] Child Welfare League of America. Too Young to Run and the Status of Child Abuse in America (1986).

I would hope that educational systems throughout the country will follow the examples set by many school systems, including Los Angeles County, in responding to this major investment in our Country's future.

EXPOSURE OF CHILDREN TO EXPLICIT AND VIOLENT MATERIALS

The question has arisen regarding the effects of adult pornography on children. Children at various ages process information differently, and the psychological sense that something has an erotic meaning comes biologically and culturally with age. (Compare the reaction of a 17 year old and the reaction of his infant brother to the sight of a woman's breasts.) There are variations in how individual children develop intellectually and physically, and there are changes in children's vulnerability at critical stages. Moreover, a particular child's reaction to sexually explicit stimuli will depend to a great degree on that child's personal strengths and familial and social structures.

For obvious ethical reasons, we cannot condone large scale studies of the effects of exposure to pornography on various age groups of children. However, one can surmise from the availability of information we have regarding developmental age vulnerabilities of children that those in the early adolescen age group might be the most susceptible and the least capable o managing social and psychological dilemma produced by exposur to pornography.4

Whatever the actual impact may be on children at any age, and given our inability to be scientifically exact on that issue, it seems clear that we have a responsibility to protect childre against whatever potential harm may result from such exposure. For this reason, I strongly support laws which prohibit the sale of pornographic materials to children and prohibit children's entry into establishments which specialize in "Adults Only" materials. I am also pleased with the voluntary actions taken by many businesses to limit children's access to sexually explicit materials.

In my opinion, violent materials, sexual or non-sexual, are cause for the most serious concern regarding potential negative effects on children's attitudes and behavior. These materials have become increasingly pervasive in our culture. There is a critical need to seriously consider how we can effectively discourage proliferation of these destructive messages which reach out to children on television, in theatres and even by way of their toys and comic books.

There are some who believe that restrictions placed upon

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[4] Michael Durfee, M.D. A Child Developmental Perspective to Conceptualize Possible Effects of Pornography on Children (March 11, 1986).

the adult consumption of pornography should be as strong as restrictions on children's consumption of pornography. The rationale given is that anything available to adults will eventually fall into the hands of children. Although there is little doubt that childhood curiosity will creatively find access to "forbidden" materials, I do not believe the "equal restriction" perspective is realistic or an avenue of choice. The laws of our society currently place many differentiated restrictions on adults and children. Certainly, the negative effects of alcohol consumption on children who access their parent's liquor cabinets is clearly established. We recommend closer parental supervision and either removal of the alcohol from the home or locking the doors of the liquor cabinet. When children become alcoholics, a growing national concern, recommendations include individual and family counseling, or Alcoholics Anonymous.

We can develop parallel responses in relation to children accessing their parent's pornography -- closer parental supervision, use of lock boxes on televisions with cable programming, and mental health or other services for children exhibiting inappropriate or anti-social behavior following the consumption of pornography. Again, while we should not deny the potential harm that pornography may inflict on children who view it, it is extremely important to keep sight of other possible causes of what we consider to be negative behavioral effects. If a child who has been exposed to pornography begins exhibiting inappropriate sexual behavior, we must be extremely careful not to focus solely on the pornography, denying the possibility that the child may have been molested or, on the other hand, denied warm loving relationships within the family unit.

Children who have a well-integrated and reinforced positive sense of self are less apt to accept violent, callous, impersonal images of other people as part of their personal concept of life. Children who have healthy age-appropriate images of affectionate behaviors are less apt to accept perverse or violent destructive images as part of their own internal or external self. They do need social support systems to absorb confusion when it is present and to provide structures that allow them to explore their own responses to such stimuli.

## PRIORITIZATION OF RESPONSE

The Commission's majority vote to encourage allocation of obscenity intervention resources in a prioritized manner has caused some concern on the part of those who believe all categories of pornography to be equally damaging. It is clear that current law enforcement resources are inadequate to respond effectively and appropriately to all types of pornography at all times. The prioritization should assist in focusing attention on those violent, degrading and dehumanizing materials that have gradually emerged, with impunity, as a major market. This does not preclude pursuing action against other material. However, it is the violent and degrading materials that reflect the changing nature of pornography in America, a major impetus for the creation of our Commission. We saw these materials, we were shocked by them, and our reactions and concerns about them should be and were reflected in the decision to give them first priority in the allocation of law enforcement resources.

## A WORD ABOUT WORDS

It was the majority opinion of the Commission that law enforcement agencies should not be encouraged to commit resources to the prosecution of the non-illustrated pornographic written word, unless the message is directed to children or involves child pornography. Again, there has been a great deal of concern regarding the possible proliferation of obscene books which encourage sexual perversions and other crimes. While I agree that passages in certain paperback books sold in adult book stores represent the most vile and offensive messages imaginable, I do not believe it is realistic or constructive to presume that obscenity prosecutions can be initiated or will be effective in protecting the public from any possible negative effects from the materials. I do, however, believe that the fear of censorship expressed by librarians and others concerned for the protection of literature which may contain "explicit" passages, is an extremely important consideration. Our Commission's respect for the special place of the written word was more a statement of support for freedom of speech than an action which was meant to, or will, change existing practices in the enforcement of obscenity laws.

## TIME AND STRUCTURE

The time and structural constraints placed upon our Commission's work were extremely problematic, causing concern regarding compromises made in the final editing process. The

pages tightly bound

workload has been unmanageable throughout the year. The ultimate task of reviewing over two thousand pages of final draft in three days time to meet our print deadline was totally unrealistic. In addition, the critical job of consolidating and clearing all the Commissioner's last minute corrections was an unreasonable expectation of the already exhausted Staff, who have reportedly worked into every night of the last several weeks. If the Commission had more resources to pursue additional study, more opportunity to meet in sub-committees, and more time to review the final product, I believe a more thoughtful and confident consensus would have resulted. However, given the Commission's limitations, the final report is a document which raises issues that are relevant and worthy of a considerable investment of time and energy made by each Commissioner and the Staff. There are two specific recommendations about which I wish to express concern.

A. RECOMMENDATION NUMBER 8

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY OBSCENITY STATUTES TO ELIMINATE MISDEMEANOR STATUS FOR SECOND OFFENSES AND MAKE ANY SECOND OFFENSE PUNISHABLE AS FELONY.

The arbitrary imposition of a felony status for second offenders could possibly discourage any actions on some second offenses by Prosecutors denied room for negotiation.

## B. RECOMMENDATION NUMBER 88

## LEGISLATURES SHOULD CONDUCT HEARINGS AND CONSIDER LEGISLATION RECOGNIZING A CIVIL REMEDY FOR HARMS ATTRIBUTABLE TO PORNOGRAPHY.

While I support the concept of civil rights actions on behalf of victims, a rewriting of the substantiation for this recommendation was not available for review by Commissioners at the time of the deadline for this statement.

It is also of considerable concern that the Commission members were never able to agree on the types of materials that fall within the framework for classes I, II, and III materials. In the absence of such clarity, and without a comprehensive survey of materials available in bookstores, theatres, video outlets, and other vendors, it is only conjecture to presume that the "predominance" of obscene materials portray degradation.

## SUMMARY

The issues surrounding pornography defy simplification, challenge objectivity, and create passionate responses from opposing extremes of a multitude of political, religious, and philosophical spectrums.

It is my sincere hope that our focus on these confounding and controversial issues will assist the American people to develop a knowledgeable concern regarding the potential impact of pornography on their children and their communities, an understanding of the personal choices and public policy alternatives available to them, and the realization that pornography is the product of a demand resulting from a host of motivations we have only begun to identify.

It has occurred to me, throughout our Commission's hearings, that the subject of our inquiry, whether relating to adult or child pornography, has a very significant and direct connection to many issues surrounding the abuse and exploitation of children. I saw the clear characteristics of a helpless child in each adult victim testifying before us, and this helped me to understand how and why they tolerated the abuses about which so many are skeptical. I saw the angry and inadequate adult reenacting his or her own childhood abuses in much of the sado-masochistic materials. Perhaps most significantly, I saw the sad, lonely and desperate search for intimacy denied in childhood on the faces of those who stood haplessly in the adult bookstores and those who told us of their addictions to obscene materials. It occurred to me, over and over again, that the real issue might be the effects of American family life on the consumption of pornography, rather than the reverse.

## Statement of Judith Becker, Ellen Levine and Deanne Tilton-Durfee

We are three women who have, in varied ways, devoted our lives to the welfare of children and families: one as a specialist in the treatment of those who sexually abuse women and children, another as a journalist covering the diverse issues facing contemporary American women and the third as a specialist in the prevention and treatment of child abuse, neglect and molestation.

We share a deep concern about the effects of pornography on American women. Nevertheless, we found these issues troublesome because those women who testified before us were so deeply divided. Many condemned pornography as an ultimate offense against women, others opposed censorship categorically and defended women's rights to consume and perform in pornography. Although each of us has her own very strong negative, personal reactions to the various pornographic depictions, we believe our acceptance of service on this Commission carried with it the responsibility to enter this arena with an open mind, to weigh fairly the evidence presented to us and to set aside our personal biases in order to develop credible and balanced recommendations for the Federal Government regarding this extremely controversial subject.

We have, throughout the Commission's hearings, witnessed devastating testimony from women victimized in the production or forced consumption of pornography, and we have seen material that is offensive to the most permissive boundaries of our imaginations. Much of this material violates the very fabric of our own ethical and moral standards.

We wish to express our strong personal objections to the offensive and totally inaccurate materials that portray women as eager victims of abuse or as beings of less competence or value to society than men. We disapprove equally of media depictions that discriminate unfairly against men, or against specific races, cultures or those with physical or mental disabilities. After consideration of the evidence presented, we conclude that those who exploit women's vulnerability in the production or consumption of pornography are inflicting harm that profoundly violates the rights of women, damages the integrity of the American family and threatens the quality of life for all men and women.

We abhor the exploitation of vulnerable people and condemn those who profit from it. We respect, however, the rights of all citizens to participate in legal activities if their participation is truly voluntary. We reject any judgmental and condescending efforts to speak on women's behalf as though they were helpless, mindless children.

Our most profound desire is that the women of America be provided an environment that encourages their sense of self-worth, self-respect and their ability to make genuine choices. We consider both the limitation of choices and sexual exploitation to be degrading attacks on the basic value and dignity of women.

## STATEMENT OF DR. JUDITH BECKER AND ELLEN LEVINE

In accepting appointments to the Attorney General's Commission on Pornography, we both believed that stimulation of a national dialogue and debate on this very controversial subject was well within the purview of the government and in the best interests of the country. To this challenging commitment we bring very different personal and professional expertise. Dr. Judith Becker is a behavioral scientist whose career has been devoted to evaluating and treating victims and perpetrators of sexual crimes. Mrs. Ellen Levine is a journalist and editor who has focused on women's news. Although our backgrounds are different, we have found throughout the hearings and Commission meetings that we share similar views about the nature of the testimony presented and alternative ways in which the issue of obscenity might be approached. We have, therefore, decided to submit this joint statement.

### I. THE PROCESS

During its public hearings, the Commission has accomplished much, garnered some press attention, and, as anticipated, created a certain amount of controversy. Our hope is that the past year's work will not end with the publication of this report, but will begin a process of discovery and disciplined study of the complicated problems associated with this subject.

We would be remiss, however, if we did not point out the limitations inherent in the investigative process we have just finished, because in some serious ways, the Commission's methods themselves have hindered the adequate pursuit of information.

A. THE LIMITATION OF THE PUBLIC FORUM

All meetings and hearings have been held as public forums, according to law, and although we do not suggest that it should have been otherwise, we must emphasize that such an open forum naturally inhibits a frank and full discussion of a subject as personal, private and emotionally volatile as the consumption of pornography. In collecting the testimony of victims, it was difficult enough to find witnesses willing to speak out about their intimate negative experiences with pornography. To find people willing to acknowledge their personal consumption of erotic and pornographic materials and comment favorably in public about their use has been nearly impossible. Since such material is selling to millions of apparently satisfied consumers, it seems obvious that the data gathered is not well balanced.

B. THE CONSTRAINTS OF TIME AND MONEY

A number of factors directly affecting the Commission complicated its work and strained its abilities to work as thoroughly and effectively as it might have. Both the time and the money needed to work through these complications was lacking and hence they were largely unsolved.

1. The very word pornography, with its negative connotation, imposes impediments to an open-minded and objective investigation. Every member of the group brought suitcases full of prior bias, including previous personal exposure, religious, ethical, social, and even professional beliefs. To some a discussion of pornography raises concerns of sincerely and deeply felt moral imperatives; to others it is a feminist issue of violence against women; and to still others, it is a lightning rod attracting debates about First Amendment guarantees with the threat of censorship seen as the overriding danger. Full airing of the differences of the members of the Commission and establishment of a wide and firm common ground was not possible in the time and with the funds allotted.

2. The issue of pornography has confounded people for centuries and has long been a subject of sincere disagreement among decent people. Pornography has religious, ethical, social, psychological and legal ramifications. The idea that eleven individuals studying in their spare time could complete a comprehensive report on so complex a matter in so constricted a time frame is simply unrealistic. No self-respecting investigator would accept conclusions based on such a study,

and unfortunately the document produced reflects these inadequacies.

3. The variety of pornography, in its forms, qualities, and intensities of expression is vast. The Commission concentrated almost exclusively on formulating recommendations aimed at law enforcement. While that fulfills the Commission's mandate, we believe that the core issues involving pornography and its prevalence are more usefully viewed as health and welfare concerns. As such, they would properly be matters for research by committees established by the National Institute of Mental Health.

Given the varied backgrounds of the commissioners, the depth and complications of the subject historically, and the variety of the materials available today, the Commission's most severe limitation was imposed by a lack of time and money to complete a thorough study.

Because it has been sixteen years since the last Commission on this topic met and it is likely to be years before another government group tangles with these questions, we believe it would have been reasonable to grant the group, if not more money, at least more time, as requested.

## II. THE MANDATE

A. The first element of the Commission's mandate was the assessment of the problem's dimensions. While there is little doubt about the proliferation of pornography since 1970, no serious effort has been made to quantify the increase, either in general or specifically as to the various types of pornography sold. We do not even know whether or not what the Commission viewed during the course of the year reflected the nature of most of the pornographic and obscene material in the market; nor do we know if the materials shown us mirror the taste of the majority of consumers of pornography. The visuals, both print and video, were skewed to the very violent and extremely degrading. While one does not deny the existence of this material, the fact that it dominated the materials presented at our hearings may have distorted the Commission's judgment about the proportion of such violent material in relation to the total pornographic material in distribution.

The Commission's investigations did reveal that technological innovations have created a new delivery system for the consumption of pornographic and erotic material (notably via home video and cable). Since the home video industry is still young, it is reasonable to assume that the supply and public demand for pornographic materials may increase. Some recent industry figures actually show video purchases and rentals of pornography on the increase. There is, however, a significant corresponding decrease in both the number of adult theaters in this country and the circulation figures of the so-called skin magazines. This may indicate that although there is a change in the way in which pornography is purchased, there is actually a stable (non-growth) market for it. We simply do not know.

Because of the stunning change in the way in which people now receive erotic stimuli (a shift from print to video), we suggest that research be conducted to discover whether and to what extent video makes a greater or stronger impression on the vulnerable users, particularly children and adolescents, than does print.

B. One critical concern of this Commission was to measure and assess pornography's role in causing anti-social behavior; but although the Commission struggled mightily to agree on definitions of such basic terms as pornography and erotica, it never did so. This failure to establish definitions acceptable to all members severely limited our ability to come to grips with the question of impact. Only the term "obscenity," which has a legal meaning, became a category we all understood. In fact, the commission failed to carve out a mutually satisfactory definition of antisocial behavior. In this statement, it should be noted, therefore, we use the phrase "antisocial behavior" to describe forced sexual acts: acts involving coercion of any kind or lack of consent. We do not include (as certain commissioners desired) such private sexual practices as masturbation, homosexuality between consenting adults or premarital sex, practices that are not the province of government to regulate.

C. The final responsibility of the Commission was to recommend to the Attorney General specific measures to limit the spread of pornography. While much of the Commission's time was spent on these proposals, only the child pornography recommendations received thorough discussion. Accordingly we strongly endorse those proposals.

We reiterate our strong belief that the paucity of certain types of testimony, including dissenting expert opinion and the haste and absence of significant debate with which other recommendations and their supporting arguments were prepared did not leave adequate time for full and fair discussions of many of the more restrictive and controversial proposals. Consequently, while we endorse many of these recommendations, we dissent on some, for reasons of critical policy differences, lack of clarity and more importantly, because evidence essential to a considered evaluation of the proposals was not presented.

For example, the concept of mandatory sentencing supported in several recommendations is a theory hotly debated by both law enforcement personnel and experts specializing in penal reform. Little testimony was heard on the merits or liabilities of this concept with the exception of pleas from understandably frustrated prosecutors discouraged by light sentencing. Without reasoned assessment of this problem, we cannot support the proposal for mandatory sentencing. Other specific recommendations with which we disagree will follow here.

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CONGRESS SHOULD ENACT A FORFEITURE STATUTE TO REACH THE PROCEEDS AND INSTRUMENTS OF ANY OFFENSE COMMITTED IN VIOLATION OF THE FEDERAL OBSCENITY LAWS.

CONGRESS SHOULD AMEND THE FEDERAL LAWS TO ELIMINATE THE NECESSITY OF PROVING TRANSPORTATION IN INTERSTATE COMMERCE. THE LAWS SHOULD BE ENACTED TO ONLY REQUIRE PROOF THAT THE DISTRIBUTION OF THE OBSCENE MATERIAL "AFFECTS" INTERSTATE COMMERCE.

CONGRESS SHOULD ENACT LEGISLATION MAKING IT AN UNFAIR BUSINESS PRACTICE AND AN UNFAIR LABOR PRACTICE FOR ANY EMPLOYER TO HIRE INDIVIDUALS TO PARTICIPATE IN COMMERCIAL SEXUAL PERFORMANCES.

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, OBSCENITY STATUTES TO ELIMINATE MISDEMEANOR STATUS FOR SECOND OFFENSES AND MAKE ANY SECOND OFFENSE PUNISHABLE AS A FELONY.

STATE LEGISLATURES SHOULD ENACT, IF NECESSARY, FORFEITURE PROVISIONS AS PART OF THE STATE OBSCENITY LAWS.

THE PRESIDENT'S COMMISSION ON UNIFORM SENTENCING SHOULD CONSIDER A PROVISION FOR A MINIMUM OF ONE YEAR IMPRISONMENT FOR ANY SECOND OR SUBSEQUENT VIOLATION OF FEDERAL LAW INVOLVING OBSCENE MATERIAL THAT DEPICTS ADULTS.

LEGISLATURES SHOULD CONDUCT HEARINGS AND CONSIDER LEGISLATION RECOGNIZING A CIVIL REMEDY FOR HARMS ATTRIBUTABLE TO PORNOGRAPHY.

ANY FORM OF INDECENT ACT BY OR AMONG "ADULTS ONLY" PORNOGRAPHIC OUTLET PATRONS SHOULD BE UNLAWFUL.

## III. TESTIMONY ON SOCIAL SCIENCE DATA

We have limited our comments here to the relatively bias-free testimony and social-science data.

Our interpretation of the material presented is, consequently, somewhat different from that of other commission members. It has lead us to a different emphasis in priorities and recommendations.

The Commission sought to break down pornography into the various types of sexually explicit material available in our society. Unfortunately, social science research to date has not uniformly followed any such categorization (although we certainly suggest that future researchers consider this option), and the attempt to force the available social science data to fit the Commission's categories is fruitless. That is why in this statement the conclusions and interpretations of what the social science data says and does not say follow the research, not the Commission, categories.

First, it is essential to state that the social science research has not been designed to evaluate the relationship between exposure to pornography and the commission of sexual crimes; therefore efforts to tease the current data into proof of a causal link between these acts simply cannot be accepted. Furthermore, social science does not speak to harm, on which this Commission report focuses. Social science research speaks of a relationship among variables or effects that can be positive or negative.

Research has evaluated adults rather than children, and it is the latter who are most likely to be influenced by pornography. Studies have relied almost exclusively on male college student volunteers, which means that the "generalizability" of this data is extremely limited. The only other category studied in depth is sex offenders. Information from the sex-offender population must be interpreted with care because it may be self-serving. The research conducted to date has been correlational and experimental. Despite these limitations, the research data can be interpreted to indicate the following:

A. In a laboratory setting, exposure to sexually violent stimuli has a negative effect on research subjects as measured by acceptance of rape myth and aggression and callousness toward women. We do not know, however, how long this attitudinal change is sustained without further stimulation; more importantly, we do not know whether and why such an attitudinal change might transfer into a behavioral change. There is reason for concern about these findings because we do know that experience with sex offenders indicates they harbor belief systems and attitudes consistent with deviant sexual practices (e.g. "women enjoy being raped" or "sexual acts with a child are a way of showing love and affection to that child"). We know further that such attitudes appear to be a precursor and maintainer of actual deviant behavior in an offender population. Although we believe the potential exists for attitudinal changes to translate into behavioral changes in some circumstances, this possibility needs considerable additional investigation.

B. Very little social-science research has been conducted evaluating the impact of non-violent degrading material on the average adult. Furthermore, there is a problem of definition about what constitutes "degrading material." We strongly encourage further research to define and evaluate the impact of such material.

C. Although research findings are far from conclusive, the preponderance of existing data indicates that non-violent and non-degrading sexually explicit materials does not have a negative effect on adults.

D. In documents attached to the main report mention has been made of a possible relationship between circulation rates of pornographic magazines and sex crime rates. One of the authors of the study on which the Commission has based its conclusion, Murray Straus, has written to explain his own research, which he suggested was being misinterpreted. "I do not believe that this research demonstrates that pornography causes rape . . . . In general the scientific evidence clearly indicates that if one is concerned with the effects of media on rape, the problem lies in the prevalence of violence in the media, not on sex in the media."

E. To date there is no single comprehensive theory that is agreed upon to explain the development of paraphilic behavior. Human behavior is complex and multi-causal. To say that exposure to pornography in and of itself causes an individual to commit a sexual crime is simplistic, not supported by the social science data, and overlooks many of the other variables that may be contributing causes. Research must be conducted on the development of sexual interest patterns if we are to understand and control paraphilic behavior.

F. Unfortunately, little is known about the impact of sexually explicit material on children. Ethically and morally one could not and would not conduct experiments to examine such a relationship. We do know that adolescents and young adults are large consumers of these materials, and little is yet known about its impact on this population. We underscore the statement made in the main body of the Commission's report regarding social science research: "In many respects, research is still at a fairly rudimentary stage, and with few attempts to standardize categories of analysis, self-reporting questionnaires, types of stimulus materials, description of stimulus materials, measurement of effects and related problems. We recommend that moneys be made available to fund further research on this topic."

## IV. ENFORCEMENT PRIORITIES

We have been encouraged by testimony from federal, state, and local officials that those involved in the heinous crime of child pornography are being prosecuted vigorously and that this effort is a national priority. We applaud that action and believe that this prosecution should continue to be a number one priority in law enforcement resource allotments.

On the other hand, we have heard frequently that there is virtually no enforcement of adult obscenity laws. Our analysis of the data leads us to believe that the sexually violent material that is unquestionably obscene and described in the main report is of sufficient concern to warrant intensified prosecution. We are concerned about such material because the violence and the eroticization of that violence may indeed be a potentially explosive mix. Even in this category, however, social science research does not claim a causal link.

The social science data, however, provides even less basis for the claim of a causal link between non-violent degrading and humiliating pornography and sexual violence. One might assume that this material may teach offensive, though not necessarily criminal, behavior to certain vulnerable consumers.

Accordingly, in communities where standards so dictate, prosecution of non-violent degrading obscene materials may assume a lesser priority. It is in this area of non-violent degrading and humiliating pornographic images that the most controversy may arise. What is seen as degrading by one viewer may in fact not be so seen by another, much in the same way that one person's erotica is another's pornography. But this is one of the categories about which much needs to be learned. Perhaps there is a distinct difference between what men see as degrading to women and what women consider to be degrading.

As vital as this category of non-violent degrading material may be to the ultimate understanding of the effects of pornographic material in society, we caution against an overinclusive interpretation of it. The Report suggests that most of the pornographic material in circulation now belongs in this category. We have not been able to draw this conclusion based on evidence presented. As stated earlier, attempts to quantify the materials in circulation and the particular character of the content of that material remain only "guesstimates."

## V. WHAT OF OUR CHILDREN?

The most disturbing issue facing the panel this year was the concern about children and their exposure to child and adult pornography. Adolescents are acknowledged as an enormous market for pornographic materials, and despite legislative efforts to restrict access, this material remains easily available to youngsters.

In fact, from an early age American children are bombarded by very stimulating sexual messages, most of which are not pornographic but certainly are frightening. This year, for example, the AIDS epidemic has prompted health officials to broadcast urgent radio and television warnings against homosexual anal intercourse and group sex and pleas for the use of condoms.

Because children may have trouble with these very public messages, and because too many young people get too much of their sex education from pornographic magazines and films, we strongly support relevant school sex education programs. Appropriate and accurate information about loving sexual experiences can help inoculate children against the potential damage from early exposure to negative images. Furthermore, we urge parents to monitor carefully their own children's exposure to these materials.

There cannot be enough done to protect our children--both from people who would abuse and seduce them into the abhorrent world of child pornography and from the unwelcome intrusion of too many sexual messages. And we urge that child pornography prosecutions be given priority over all other forms of obscenity violations.

## VI. CONCLUSION

Why does pornography thrive and proliferate today? Is the demand for pornography a mirror or a beacon? Why do consumers support a multi-million dollar market for such a variety of products? Is lack of vigorous law enforcement to blame? Is society more tolerant of pornography than ever before? Is society's perception of what constitutes pornography changing? Do the production and increasing sophistication of sexually explicit materials in themselves stimulate more interest in pornographic magazines, films and videos? Or vice-versa?

Or are other social forces chiefly to blame?

The most knowledgeable observers suggest that these are complex and difficult questions, ones that cannot be easily answered and which in our opinions this Commission did not adequately address.

Consider what has occurred during the past two decades. The birth control pill has become widely used, with an associated increase in sexual activity. The mobility of the population continues to increase, with a subsequent breakdown in community attachments for more and more people. The divorce rate has skyrocketed. We have a national drug abuse problem. The Vietnam war has taken its toll on the national psyche. Twenty-five million additional women have joined the work force. The so-called Sexual Revolution has come and gone (Time magazine on April 9, 1984, announced its demise). Has not each of these factors and others had a role to play in the growth of pornography?

After a year of forums and deliberations, it is tempting to join in offering simple solutions to complex problems, in the form of the Commission's Recommendations. But we are not persuaded to do so. We believe it would be seriously misleading to read this report and see a green light for prosecuting all pornographers. We still know too little about why many men and some women use and enjoy pornography; if and why women's and men's sexual arousal response patterns to pornography differ. We still have more questions than answers, and we stress the need for both non-governmental solutions and tolerance for the views of others.

The commission of sexual crimes, the degradation of women, and the abuse and mistreatment of children are terrible and pressing problems that concern us urgently. As we face up to the extensive public consumption even of certain types of extreme pornographic materials, a need for massive public re-education about potential problems associated with them seems strongly indicated. We cannot tolerate messages of sexual humiliation directed to any group. But to make all pornography the scapegoat is not constructive. In the absence of significant social sanctions against pornography, the possibility of halting its use seems as slim as was the chance of halting the sales of liquor during Prohibition. In conclusion we repeat that we face a complex social and legal problem that requires extensive study before realistic remedies can be recommended.

# PART TWO

# Chapter 1

# Introduction

## 1.1 The Commission and Its Mandate

The Attorney General's Commission on Pornography (referred to throughout this Report as "The Commission") was established pursuant to the Federal Advisory Committee Act[1] on February 22, 1985 by then Attorney General of the United States William French Smith, at the specific request of President Ronald Reagan. Notice of the formation of The Commission, as required by Section 9(c) of the Federal Advisory Committee Act, was given to both Houses of Congress and to the Library of Congress on March 27 and March 28, 1985. On May 20, 1985, Attorney General Edwin Meese III publicly announced formation of The Commission and the names of its eleven members, all of whom served throughout the duration of The Commission's existence.

The formal mandate of The Commission is contained in its Charter, which is attached to this Report in Appendix A. In accordance with that Charter, we were asked to "determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." Our scope was undeniably broad, including the specific mandate to "study . . . the dimensions of the problem of pornography," to "review . . . the available empirical evidence on the relationship between exposure to pornographic materials and antisocial behavior," and to explore "possible roles and initiatives that the Department of Justice and agencies of local, State, and federal government could pursue in controlling, consistent with constitutional guarantees, the production and distribution of pornography."

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[1] 5 U.S.C. App.2, 86 Stat.770(1972), as amended by 90 Stat.1241, 1247(1976)

Because we are a commission appointed by the Attorney General, whose responsibilities are largely focused on the enforcement of the law, issues relating to the law and to law enforcement have occupied a significant part of our hearings, our deliberations, and the specific recommendations that accompany this Report. That our mandate from the Attorney General involves a special concern with enforcement of the law, however, should not indicate that we have ignored other aspects of the issue. Although we have tried to concentrate on law enforcement, we felt that we could not adequately address the issue of pornography, including the issue of enforcement of laws relating to pornography, unless we looked in a larger context at the entire phenomenon of pornography. As a result, we have tried to examine carefully the nature of the industry, the social, moral, political, and scientific concerns relating to or purportedly justifying the regulation of that industry, the relationship between law enforcement and other methods of social control, and a host of other topics that are inextricably linked with law enforcement issues. These various topics are hardly congruent with the issue of law enforcement, however, and thus it has been necessarily the case that issues other than law enforcement in its narrowest sense have been before us. In order that this Report accurately reflect what we thought about and what we felt to be important, we have included in the Report our findings and recommendations with respect to many issues that are related to but not the same as law enforcement.

For similar reasons, we have been compelled to consider substantive topics not, strictly speaking, specified exactly in our charter. A few examples ought to make clear the problems that surround trying to consider an issue that itself has no clear boundaries: We have heard testimony and considered the relationship between the pornography industry and organized crime, and this has forced us to consider the nature of organized crime itself; we have examined the evidence regarding the relationship between pornography and certain forms of anti-social conduct, and this has necessitated thinking about those other factors that might also be causally related to anti-social conduct, and about just what conduct we consider anti-social; we have thought about child pornography, and this has caused us to think about child abuse; and we have, in the course of thinking about the relationship between pornography and the family, thought seriously about the importance of the family in contemporary America. This list of examples is hardly exhaustive. We mention them here, however, only to show that our inquiry could not be and has not been hermetically sealed. But we all feel that what we may have lost in focus has more than been compensated for in the richness of our current contextual understanding of the issue of pornography.

## 1.2 The Work of the Commission

We have attempted to conduct as thorough an investigation as our severe budgetary and time constraints permitted. The budgetary constraints have limited the size of our staff, and have prevented us from commissioning independent research. We especially regret the inability to commission independent research, because in many cases our deliberations have enabled us to formulate issues, questions, and hypotheses in ways that are either more novel or more precise than those reflected in the existing thinking about this subject, yet our budgetary constraints have kept us from testing these hypotheses or answering these questions. In numerous places throughout this report we have urged further research, and we often recommend that research take place along specific lines. We hope that our suggestions will be taken up by researchers. Neither this Report nor any other should be taken as definitive and final, and we consider our suggestions for further research along particular lines to be one of the most important parts of this document.

The time constraints have also been significant. We all wish we could have had much more time for continued discussion among ourselves, as the process of deliberation among people of different backgrounds, different points of view, and different areas of expertise has been perhaps the most fruitful part of our task. Yet we have been required to produce a report within a year of our creation as a Commission, and our ability to meet together has been limited by the budgetary constraints just referred to, as well as by the fact that all of us have responsibilities to our jobs, our careers, and to our families that make it impossible to suspend every other activity in which we are engaged for the course of a year.

Despite these limitations, we have attempted to be as careful and as thorough as humanly possible within the boundaries of these constraints. We thought it especially important to hear from as wide a range of perspectives as possible, and as a result held public hearings and meetings in Washington, D.C., from June 18 to 20, 1985; in Chicago, Illinois, from July 23 to 25, 1985; in Houston, Texas, from September 10 to 12, 1985; in Los Angeles, California, from October 15 to 18, 1985; in Miami, Florida, from November 19 to 22, 1985; and in New York City from January 21 to 24, 1986. With the exception of the initial hearing in Washington, each of the hearings had a central theme, enabling us to hear together those people whose testimony related to the same issue. Thus the hearings in Chicago focused on the law, law enforcement, and the constraints of the First Amendment; in Houston we concentrated on the behavioral sciences, hearing from psychologists, psychiatrists, sociologists, and others who have been clinically or experimentally concerned with examining the relationship between pornography and human behavior; in Los Angeles our primary concern was the production side of the industry, and we heard testimony from those who were knowledgeable about or involved in the process of producing, distributing, and marketing pornographic materials; in Miami most of our time was spent dealing with the issue of child pornography, and we heard from people who in either their professional or personal capacities had familiarity with the creation, consequences, or legal control of child pornography; and in New York we heard about organized crime and its relationship with the production, distribution, and sale of pornographic materials.

Although these hearings each had their specific concentration, we also attempted to hear people throughout the country who wished to address us on these and many other issues, and one of the reasons for conducting hearings in different cities in various parts of the country was precisely to give the greatest opportunity for the expression of views by members of the public. Time did not permit us to hear everyone who desired to speak to us, but we have tried as best we could to allow a large number of people to provide information and to express their opinions. The information provided and the opinions expressed represented a wide range of perspectives and views on the issues before us. Many of the people appearing before us were professionals, who because of their training and experiences could enlighten us on matters that would otherwise have been beyond our knowledge. Many people represented particular points of view, and we are glad that varying positions have been so ably presented to us. And many others have been members of the public who only wished to represent themselves, relating either points of view or personal experiences. All of this testimony has been valuable, although we recognize its limitations. These limitations will be discussed throughout this report, although there is one that deserves to be highlighted in this introductory section. That is the distortion that has been the inevitable consequence of the fact that some pornography is illegal, and much pornography is, regardless of legality or illegality, still considered by many people to be harmful, offensive, or in some other way objectionable. As a result, legal as well as social constraints may distort the sample, in that they severely limit the willingness of many people to speak publicly in favor of pornography. This phenomenon may have been somewhat counterbalanced by the financial resources available to many of those from the publishing and entertainment industries who warned us of the dangers of any or most forms of censorship. But the point remains that various dynamics are likely to skew the sample available to us. In evaluating the oral evidence, we have thus been mindful of the fact that the proportion of people willing to speak out on a particular subject, and from a particular point of view, may not be a fully accurate barometer of the extent that certain views are in fact held by the population at large.

Many of the limitations that surround oral testimony lessen considerably when written submissions are used, and we have made every effort to solicit written submissions both from those who testified before us and from those who did not. We have relied heavily on these, in part because they represent the views of those who could not testify before us, and in part because they frequently explored issues in much greater depth than would be possible in a brief period of oral testimony.

The written submissions we received constitute but a miniscule fraction of all that has been written about pornography. While it would not be accurate to say that each of us has read all or even a majority of the available literature, we have of course felt free to go beyond the written submissions and consult that which has been published on the subject, and much of what is contained in this report is a product of the fact that many thoughtful people have been contemplating the topic of pornography for a long time. To ignore this body of knowledge would be folly, and we have instead chosen to rely on more information rather than less. We could not have responsibly conducted our inquiry without spending a considerable period of time examining the materials that constitute the subject of this entire endeavor. Engaging in this part of our task has been no more edifying for us than it is for those judges who have the constitutional duty to review materials found at trial to be legally obscene.[2] Obviously, however, it was an essential part of our job, and many witnesses provided to us for examination during our hearings and deliberations samples of motion pictures, video tapes, magazines, books, slides, photographs, and other media containing sexually explicit material in all of its varied forms. In addition, when in Houston we visited three different establishments specializing in this material, and in that way were able to supplement the oral and written testimony with our own observations of the general environment in which materials of this variety are frequently sold.

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[2] "[W]e are tied to the 'absurd business of perusing and viewing the miserable stuff that pours into the Court . . .' Interstate Circuit, Inc. v. Dallas, 390 U.S., at 707 (separate opinion of Harlan, J.). While the material may have varying degrees of social importance, it is hardly a source of edification to the members of this Court who are compelled to view it before passing

In addition to our public hearings, we have also had public working sessions devoted to discussing the subject, our views on it, and possible findings, conclusions, and recommendations. These working sessions occupied part of our time when we were in Houston, Los Angeles, Miami, and New York, and in addition we met solely for these purposes in Scottsdale, Arizona, from February 26 to March 1, 1986, and in Washington, D.C., from April 29 to May 2, 1986. As we look back on these sessions, there is little doubt that we have all felt the constraints of deliberating in public. It can hardly be disputed that the exploration of tentative ideas is more difficult when public exposure treats the tentative as final, and the question as a challenge. Still, we feel that we have explored a wide range of points of view, and an equally wide range of vantage points from which to look at the problem of pornography. As with any inquiry, more could be done

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on its obscenity." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92-93(1973) (Brennan, J., dissenting).

if there were more time, but we are all satisfied with the depth and breadth of the inquiries in which we have engaged. When faced with shortages of time, we have chosen to say here less then we might have been able to say had we had more time for our work, but we are convinced that saying no more than our inquiries and deliberations justify is vastly preferable to paying for time shortages in the currency of quality or the currency of accuracy. Thus, given the many constraints we operated under, we believe this Report adequately reflects both those constraints and the thoroughness with which we have attempted to fulfill our mandate.

Finally, we owe thanks to all those who have assisted us in our work. Although in another part of this Report we express our gratitude more specifically, we wish here to note our appreciation to an extraordinarily diligent staff, to numerous public officials and private citizens who have spent much of their own time and their own money to provide us with information, and especially to a large number of witnesses who appeared before us at great sacrifice and often at the expense of having to endure great personal anguish. To all of these people and others, we give our thanks, and we willingly acknowledge that we could not have completed our mission without them.

1.3 The 1970 Commission on Obscenity and Pornography Our mission and our product will inevitably be compared with the work of the President's Commission on Obscenity and Pornography, which was created in 1967, staffed in 1968, and which reported in 1970. Some of the differences between the two enterprises relate to structural aspects of the inquiry. The 1970 Commission had a budget of $2,000,000 and two years to complete its task. We had only one year, and a budget of $500,000. Taking into account the changing value of the dollar,[3] the 1970 Commission had a budget nearly sixteen times as large as ours, yet held only two public hearings. We do not regret having provided the opportunity for such an extensive expression of opinion, but it has even further depleted the extremely limited resources available to us. In addition to differences in time, budget, and staffing, there are of course differences in perspective. Although the work of the 1970 Commission has provided much important information for us, all of us have taken issue with at least some aspects of the earlier Commission's approach, and all of us have taken issue with at least some of the earlier Commission's conclusions. We have tried to explain our differences throughout this Report, but it would be a mistake to conclude that we saw our mission as reactive to the work of others sixteen years earlier. In sixteen years the world has seen enormous technological changes that have affected the transmission of sounds, words, and images. Few aspects of contemporary American society have not been affected by cable television, satellite communication, video tape recording, the computer, and competition in the telecommunications industry. It would be surprising to discover that these technological developments have had no effect on the production, distribution, and availability of pornography, and we have not been surprised. These technological developments have themselves caused such significant changes in the practices relating to the distribution of pornography that the analysis of sixteen years ago is starkly obsolete. Nor have the changes been solely technological. In sixteen years there have been numerous changes in the social, political, legal, cultural, and religious portrait of the United States, and many of these changes have undeniably involved both sexuality and the public portrayal of sexuality. With reference to the question of pornography, therefore, there can be no doubt that we confront a different world than that confronted by the 1970 Commission.

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[3] Taking 1967, the date of creation of the 1970 Commission, as the base year, the dollar at the end of 1984, five months before this Commission commenced work, was worth $0.31.

Perhaps most significantly, however, studying an issue that was last studied in the form of a national commission sixteen years ago seems remarkably sensible even apart from the social and technological changes that relate in particular to the issue of pornography. Little in modern life can be held constant, and it would be strikingly aberrational if the conclusions of one commission could be taken as having resolved an issue for all time. The world changes, research about the world changes, and our views about how we wish to deal with that world change. Only in a static society would it be unwise to reexamine periodically the conclusions of sixteen years earlier, and we do not live in a static society. As we in 1986 reexamine what was done in 1970, so too do we expect that in 2002 our work will similarly be reexamined.

We do not by saying this wish to minimize the fact that we are different people from those who studied this issue sixteen years ago, that we have in many cases different views, and that we have in a number of respects reached different conclusions. Whether this Commission would have been created had the 1970 Commission reached different conclusions is not for us to say. But we are all convinced that the creation of this Commission at this time is entirely justified by the difference between this world and that of 1970, and we have set about our task with that in mind.

### 1.4 Defining Our Central Terms

Questions of terminology and definition have been recurring problems in our hearings and deliberations. Foremost among these definitional problems is trying to come up with some definition for the word "pornography." The range of materials to which people are likely to affix the designation "pornographic" is so broad that it is tempting to note that "pornography" seems to mean in practice any discussion or depiction of sex to which the person using the word objects. But this will not do, nor will an attempt to define "pornography" in terms of regulatory goals or condemnation. The problem with this latter strategy is that it channels the entire inquiry into a definitional question, when it would be preferable first to identify a certain type of material, and then decide what, if anything, should be done about it. We note that this strategy was that adopted by the Williams

Committee in Great Britain several years ago,4 which defined pornography as a description or depiction of sex involving the dual characteristics of (1) sexual explicitness; and (2) intent to arouse sexually. Although definitions of the sort adopted by the Williams Committee contain an admirable dose of analytic purity, they unfortunately do not reflect the extent to which the appellation "pornography" is undoubtedly pejorative. To call something "pornographic" is plainly, in modern usage, to condemn it, and thus the dilemma is before us. If we try to define the primary term of this inquiry at the outset in language that is purely descriptive, we will wind up having condemned a wide range of material that may not deserve condemnation. But if on the other hand we incorporate some determination of value into our definition, then the definition of pornography must come at the end and not the beginning of this report, and at the end and not at the beginning of our inquiry. Faced with this dilemma, the best course may be that followed by the Fraser Committee in Canada,[5] which decided that definition was simply futile. We partially follow this course, and pursuant to that have tried to minimize the use of the word "pornography" in this Report. Where we do use the term, we do not mean for it to be, for us, a statement of a conclusion, and thus in this Report a reference to material as "pornographic" means only that the material is

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[4] Report of the Home Office Committee on Obscenity and Film Censorship (Bernard Williams, Chairman) (1978)

[5] Report of the Special Committee on Pornography and Prostitution (Paul Fraser, Q.C., Chairman) (1985)

predominantly sexually explicit and intended primarily for the purpose of sexual arousal. Whether some or all of what qualifies as pornographic under this definition should be prohibited, or even condemned, is not a question that should be answered under the guise of definition.

If using the term "pornography" is problematic, then so too must be the term "hard core pornography." If we were forced to define the term "hard core pornography," we would probably note that it refers to the extreme form of what we defined as pornography, and thus would describe material that is sexually explicit to the extreme, intended virtually exclusively to arouse, and devoid of any other apparent content or purpose. This definition may not be satisfactory, but we all feel after our work on this Commission that the late Justice Stewart was more correct than he is commonly given credit for having been in saying of hard core pornography that although he could not define it, "I know it when I see it."[6] But although we are inclined to agree with Justice Stewart, we regrettably note that the range of material to which witnesses before us have applied this term is far broader than we would like, and we therefore conclude that careful analysis will be served if we use this term less rather than more.

Trying to define the word "obscenity" is both more and less difficult. It is more difficult because, unlike the word

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[6] Jacobellis v. Ohio, 378 U.S. 184, 197(1964) (Stewart. J., concurring).

"pornography," the word "obscenity" need not necessarily suggest anything about sex at all. Those who would condemn a war as "obscene" are not misusing the English language, nor are those who would describe as "obscene" the number of people killed by intoxicated drivers. Given this usage, the designation of certain sexually explicit material as "obscene" involves a judgment of moral condemnation, a judgment that has led for close to two hundred years to legal condemnation as well. But although the word "obscene" is both broader than useful here as well as being undeniably condemnatory, it has taken on a legal usage that is relevant in many places in this Report. As a result, we will here use the words "obscene" and "obscenity" in this narrower sense, to refer to material that has been or would likely be found to be obscene in the context of a judicial proceeding employing applicable legal and constitutional standards. Thus, when we refer to obscene material, we need not necessarily be condemning that material, or urging prosecution, but we are drawing on the fact that such material could now be prosecuted without offending existing authoritative interpretations of the Constitution. Numerous submissions to us have made reference to "erotica." It seems clear to us that the term as actually used is the mirror image of the broadly condemnatory use of "pornography," being employed to describe sexually explicit materials of which the user of the term approves. For some the word "erotica" describes any sexually explicit material that contains neither violence nor subordination of women, for others the term refers to almost all sexually explicit material, and for still others only material containing generally accepted artistic value qualifies as erotica. In light of this disagreement, and in light of the tendency to use the term "erotica" as a conclusion rather than a description, we again choose to avoid the term wherever possible, preferring to rely on careful description rather than terms that obscure more than advance rational consideration of difficult issues.

Various other terms, usually vituperative, have been used at times, in our proceedings and elsewhere, to describe some or all sexually explicit materials. Such terms need not be defined here, for we find it hard to see how our inquiry is advanced by the use of terms like "smut" and "filth." But we have also encountered frequent uses of the term "X-rated," and a few words about that term are appropriate here. As will be discussed in detail in the section of this Report dealing with the production of sexually explicit materials, "X" is one of the ratings of the Motion Picture Association of America (MPAA), a private organization whose ratings of films are relied upon by theaters and others to determine which films are or are not suitable for people of various ages. But the MPAA rating system is not a series of legal categories, and does not have the force of law. Although many films that carry either an "X" rating or no rating might be deemed to be legally obscene, many more would not, and it is plain that many X-rated films could not conceivably be considered legally obscene. Moreover, there is no plain connection between the words "pornographic" and "X-rated," and once again it seems clear that common usage would apply the term "pornography" to a class of films that overlaps with but is not identical to the class encompassed by the "X" rating. As a result, we avoid the term "X-rated," except insofar as we are discussing in particular the category of materials so rated in the context of the purposes behind the MPAA rating system.

# Chapter 2

# The History Of Pornography

## 2.1 Pornography as Social Phenomenon

Descriptions of sex are as old as sex itself. There can be little doubt that talking about sex has been around as long as talking, that writing about sex has been around as long as writing, and that pictures of sex have been around as long as pictures. In this sense it is odd that historical treatments of pornography turn out to be historical treatments of the regulation, governmental or otherwise, of pornography. To understand the phenomenon of pornography it is necessary to look at the history of the phenomenon itself, prior to or at least distinct from the investigation of the practice of restricting it. Some works on the history of sexual behavior, eroticism, or erotic art help to serve this goal, but the history of pornography still remains to be written. Commissioning independent historical research was far beyond our mandate, our budget, and our time constraints, yet we do not wish to ignore history entirely. We feel it appropriate to offer the briefest overview here, but we urge as well that more comprehensive historical study be undertaken.

The use of comparatively explicit sexual references for the purposes of entertainment or arousal is hardly a recent phenomenon. Greek and Roman drama and poetry was frequently highly specific, and the works of Aristophanes, Catullus, Horace, and Ovid, to name just a few, contain references to sexual activity that, by the standards of the time, are highly explicit. Scenes of intercourse have been found on the walls of the brothel at Pompeii, and the Roman sculptural representations of the god Priapus are as bawdy as Aubrey Beardsley's most explicit drawings. Obviously the explicitness of the past must be viewed in light of the times, and there is no question but that the works of Aristophanes are less shocking to our contemporary vision than are some of the materials currently shown in adult theaters. Yet to ask what the Romans would have thought about "Deep Throat" is akin to asking what the Romans would have thought about helicopters. The more useful historical question is whether highly explicit sexuality for the times was a part of the literature and discourse of the times, and the answer to that question is plainly "yes."

Similar observations can be made about later historical periods and about other cultures. The Thousand and One Nights and the Kamasutra are but examples of the fact that numerous eastern cultures also have a long history of comparatively explicit depictions and descriptions of sexuality. In western cultures the explicit treatment of sex continued through modern history. Whether in the form of the medieval bawdy ballads and poems of Chaucer, Dunbar, and others, or in the form of the French farces of the fourteenth and fifteenth centuries, or in the form of the art and poetry of Renaissance Florence, or in the form of Elizabethan ballads and poetry, sexuality, and quite explicit sexuality at that, was a recurrent theme in drama, in poetry, in song, and in art.

We can be fairly certain that sexually explicit descriptions and depictions have been around in one form or another almost since the beginning of recorded history, and we can also be fairly certain that its regulation by law in a form resembling contemporary regulation of sexually explicit materials is a comparatively recent phenomenon. It is difficult, however, to draw useful conclusions from this aspect of the history. For one thing, until the last several hundred years, almost all written, drawn, or printed material was restricted largely to a small segment of the population that undoubtedly constituted the social elite. The drama of the classical age was frequently highly sexually explicit, or at least suggestive, but its audience tended to be limited to the wealthiest, best educated, and most powerful members of society. And of course the historical or universal presence of a phenomenon need not justify permitting its continuation. Slavery was a central fixture of much of the past, and warfare and ethnocentricity are as nearly universal as sexually explicit depictions, but the sensitivities of most cultures demand that such practices be discouraged.

In addition, it is a mistake to draw too many conclusions about social tolerance and social control from the presence or absence of laws or law enforcement practices. There is little indication that sexual conduct was part of classical drama, and the very fact that many sexual references were veiled (however thinly) rather than explicit indicates that some sense of taboo or social stigma has always been in most societies attached to public discussion of sexuality. Yet although some degree of inhibition obviously attached to public descriptions and depictions of sexual acts, it is equally clear that the extent of these inhibitions has oscillated throughout history. In somewhat cyclical fashion, social tolerance of various practices has been at times limited and at times extensive. To conclude that inhibition, in some form or another, of public discussion and representations of sexual practices is a totally modern phenomenon is to overstate the case and to misinterpret the evidence from earlier times. But to assume that public discussions and descriptions of sexuality were, prior to 1850, always as inhibited as they were in English speaking countries from 1850 to 1950 is equally mistaken.

We have mentioned here the early history of pornography in large part to encourage thinking about sexually explicit material as social phenomenon as well as object of governmental regulation. Although our task is largely to think about laws and law enforcement, we know that thinking about law requires thinking as well about the social foundations of the practice involved. Most historical study to date has not been about the social practice of pornography, but largely about control of that social practice by government. If the use of sexually explicit material is to be understood fully, the scope of thinking about the issue should be broadened substantially.

### 2.2 Regulation and the Role of Religion

When earlier social inhibitions about public descriptions and depictions of sexuality and sexual practices came to be enforced by law, it was largely in the context of religious rather than secular concerns. Moreover, the earliest enforcement efforts were directed not against descriptions or depictions of sex itself, but only against such depictions when combined with attacks on religion or religious authorities.

This phenomenon of regulation in defense of religion rather than in defense of decency can be seen by the tolerance, at least in European cultures, of secular bawdiness up to the middle of the seventeenth century. Although many European countries rigidly controlled written and printed works from medieval times through the seventeenth century, this control was exercised only in the name of religion and politics, and not in the name of decency. In one legal form or another, and in secular as well as ecclesiastical tribunals, heresy, blasphemy, treason, and sedition were all severely sanctioned, but sexually explicit representations alone were rarely treated as a matter justifying punishment or restraint. Perhaps the best example of this phenomenon was the action of the Council of Trent in 1573, when it permitted publication of a version of Boccacio's Decameron in which the sinning priests and nuns were converted into sinning members of the laity.

If we focus on England, from which our legal system emerged, it is commonly acknowledged that sexuality itself was not treated as a matter for governmental legal concern until 1663. That year saw the conviction in London of Sir Charles Sedley, but the activity for which he was convicted hardly looks like a case involving pornography.[7] Instead, Sedley was convicted of the crime of committing a breach of the peace for getting drunk, removing his clothes, uttering profane remarks, and pouring urine on the crowd below the tavern balcony on which he was standing at the time. Although Sedley's profane remarks included words, there seems little doubt that he would have been convicted even had he remained silent. The significance of this case, therefore, lies in the fact that mere indecent behavior, absent any attack on religion, and absent any challenge to secular authority, was for the first time perceived to be something deserving of governmental involvement. Prior to Sedley's case, government stepped in to protect the person and his property, to protect the authority of the state, and to protect the church. With Sedley's case came the beginning of a broader range of governmental concerns, and thus Sedley's case is properly seen as the precursor of most modern regulation of sexually explicit materials.

Even after Sedley's case, the common law was hardly eager to come to the defense of decency. Throughout the seventeenth and eighteenth centuries, common law courts in England were only occasionally asked to take action against the kind of material that would then have been considered pornographic. Even when asked, the courts were often reluctant to respond. In 1708, for example, James Read was indicted in London for publishing an extremely explicit book entitled The Fifteen Plagues of a Maidenhead. The Queen's Bench court, however, dismissed the indictment, and Lord Justice Powell's statement provides an apt summary of the general reaction of the law to sexually explicit materials until very late in the eighteenth century:

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[7] King v. Sedley, 1 Keble 620 (K.B.), 83 Eng. Rep. 1146 (1663).

> "This is for printing bawdy stuff but reflects on no person, and a libel must be against some particular person or persons, or against the Government. It is stuff not fit to be mentioned publicly; if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law to punish it, I wish there were, but we cannot make law; it indeed tends to the corruption of good manners, but that is not sufficient for us to punish."[8]

Not all of the common law reaction to sexual explicitness absent religious blasphemy was the same. In 1727 Edmund Curll was convicted for corrupting public morals on account of his publication of Venus in the Cloister, or the Nun in Her Smock,[9] and the Crown's attack on John Wilkes, largely on the basis of his activities as political dissident, included prosecution for publishing his highly explicit Essay on Woman.[10] Yet at about the same time, in 1748 to be exact, the publication of John Cleland's Memoirs of a Woman of Pleasure, better known as Fanny Hill, took place without either public outcry or governmental intervention.

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[8] Queen v. Read, Fortescue's Reports 98, 92 Eng. Rep. 777 (1708).

[9] Dominus Rex v. Curll, 2 Str. 789, 93 Eng. Rep. 849 (1727). Because the religious aspects of this book were anti-Catholic, it seems safe to conclude that protection of religion was no part of the governmental desire to indict or to convict.

[10] The King v. John Wilkes, 2 Wils. K.B. 151, 95 Eng. Rep. 737 (1764), 4 Burr. 2527, 98 Eng. Rep. 327 (1770).

The history of the English experience with sexually explicit materials is largely paralleled by the experiences in other European countries, and in the English colonies, including those in North America. As the world entered the nineteenth century, it remained the case that in most of the world there was greater tolerance for sexually explicit writing, printing, and drawing than there would be fifty years later, and that governmental action against spoken, written, or printed materials remained largely devoted to protecting the authority of the state and to protecting the integrity and values of religion.

### 2.3 Obscenity Law - The Modern History

As indicated in the previous section, there were traces of legal concern with decency itself in the eighteenth century, but these were little more than traces. If one is searching for the roots of modern American obscenity law, one must look to the first half of the nineteenth century in both Great Britain and the United States. The impetus in Britain came initially from private organizations such as the Organization for the Reformation of Manners and its successor the Society for the Suppression of Vice. As printing became increasingly economical, printed materials became more and more available to the masses. Thus, the kinds of sexually explicit material that had circulated relatively freely in England among the elite during the eighteenth century and earlier now became more readily available to everyone. With this increased audience came an increase in demand, and with the increased demand came an increased supply. As a result, the early part of the nineteenth century saw much greater production and circulation of material as sexually explicit as had been less widely circulated earlier. And because the audience was more broad-based, the material itself became not necessarily more explicit, but certainly briefer, simpler, and more straightforward.

These developments in England came at about the same time as general views about sexual morality, and especially about public sexual morality, were becoming increasingly stern. In an important sense, Victorianism preceded Victoria, and thus the initiatives of organizations like the Society for the Suppression of Vice found a receptive audience in the population at large, in government, and in the judiciary. Because private prosecution for criminal offenses was part of the English system of criminal justice at the time, the Society and others like it were able to commence their own criminal prosecutions, and their efforts from the early 1800s through the 1860s resulted in many prosecutions for obscene libel, as it had by then come to be called. Most of these prosecutions were successful, and by the 1860s there had developed a well established practice of prosecuting people for distributing works perceived as immoral.

The 1800s also saw the development of more effective ways of printing drawings in one form or another for mass circulation, and saw as well the development of photography. Not surprisingly, printed materials with a sexual orientation came to include increasingly large amounts of pictorial material. This development not only increased the impact of the materials, and therefore the offensiveness of many of the materials, but also increased their accessibility. With literacy no longer a requirement for appreciation, the market demand increased, and so, consequently, did the supply. Legal reactions to the proliferation of pictorial materials, again largely inspired by the Society for the Suppression of Vice and similar organizations, included the Vagrancy Act of 1824, which provided criminal penalties for the publication of an indecent picture, as well as legislation enacted in 1853 directed primarily at the increasing importation into England of so-called "French postcards."

American developments were similar. Although prior to 1800 there existed colonial statutes and some common law cases seemingly inclusive of profanity or sexual immorality, again the plain intent of these laws, as well as their universal application, was only to that which was blasphemous or in some other way threatening to religion. Pure sexual explicitness, while often condemned, was not until after 1800 taken to be a - matter of governmental concern. After 1800, however, trends with respect to the type of material available and the audience to whom it was directed were quite similar to the trends in England.

The reaction was also similar, and in Pennsylvania in 1815 the case of Commonwealth v. Sharpless[11] represented the first reported conviction in the United States for the common law crime of obscene libel. Massachusetts followed six years later, in the case of Commonwealth v. Holmes,[12] and at about the same time Vermont passed the country's first statute prohibiting the publication or distribution of obscene materials. Other states followed, and by the middle of the nineteenth century the production and distribution of obscene materials was a crime throughout most of the United States.

As in England, however, most of the enforcement impetus in the United States came from private organizations. Most prominent among these were the Watch and Ward Society in Boston and the New York Society for the Suppression of Vice. The New York Society for the Suppression of Vice, officially created in 1873, was largely the product of the efforts of Anthony Comstock, who crusaded actively from about that time until his death in 1915 for greater restrictions on indecent materials, and for more vigorous prosecution of the laws against them. Although he was also actively opposed to light literature, pool halls, lotteries, gambling dens, popular magazines, weekly newspapers, contraception, and abortion, most of his energies were directed at sexually explicit magazines, books, and pictures. In large part his most vigorous efforts were directed at magazines like

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[11] 2 Serg. & Rawle 91 (1815).

[12] 17 Mass. 336 (1821).

The National Police Gazette, and other generally non-artistic works. Although Comstock admitted that artistic or literary merit did not concern him if the material dealt with "lust," most prosecutions of the time were for comparatively unimportant works, a phenomenon that was to change in the early part of the twentieth century. Comstock was largely responsible for the enactment of the federal laws that still, with only comparatively minor modifications through the years, constitute the bulk of the federal laws dealing with obscene materials. And he himself, as a specially appointed agent of the Post Office Department, enthusiastically and vigorously enforced the law. Shortly before his death, he announced with pride that he had "convicted persons enough to fill a passenger train of sixty-one coaches, sixty coaches containing sixty passengers each and the sixty-first almost full. I have destroyed 160 tons of obscene literature."

Although Comstock's efforts were the most vigorous, the most extensive, and the most effective, similar initiatives took place throughout the United States during the latter part of the nineteenth century and the early part of the twentieth. The result of this had a profound effect on the nature of the industry, for throughout the first half of the twentieth century in the United States the market for sexually explicit materials was almost exclusively clandestine. During this period prosecutions and legal developments surrounded the attempted and often successful actions against works now (and even then) commonly taken to be of plain literary or artistic merit. The law concerned itself not only with comparatively explicit works such as D.H. Lawrence's Lady Chatterley's Lover and James Joyce's Ulysses, but works containing suggestions of sexual immorality no more explicit than that in, for example, Theodore Dreiser's An American Tragedy. The Supreme Judicial Court of Massachusetts found this book to be obscene because "the seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might come would not read the obscene passages, or having read them, would continue to read on until the evil effects of the obscene passages were weakened or dissipated with the tragic denouement of the tale." [13]

With publications such as An American Tragedy and Esquire magazine[14] constituting the legal skirmishes, it was plain that truly sexually explicit material could not circulate openly, and in fact it did not for much of this century. It still existed, however, despite having been driven rather deeply underground. We discuss the more recent history of the production, distribution, and sale of truly explicit material at greater length in later in this Report dealing with the nature of the industry in general, but it is important to note here that the existence of legal disputes about mainstream literary works did not mean that these works constituted the extent of what was available. So-called "stag films" were produced and distributed in a highly surreptitious fashion. Sales of pornographic pictures, magazines, and eight millimeter films took place through the mails as a result of advertisements in heavily guarded language, or through sales by someone who knew someone who knew someone else, or in some form or another "under the counter" in establishments primarily devoted to more accepted material. Until the 1960s, therefore, the law operated largely in two quite different roles. On the one hand, and more visible, were the prosecutions of books and films that contained substantial merit and were directed to and available to a general audience. But on the other hand were enforcement efforts against much more explicit material, distributed in much more surreptitious fashion, as to which serious constitutional or definitional issues never arose. It was not until the early 1960s, when the Supreme Court began actively to scrutinize the contents of material found to be obscene, that attempted prosecutions of unquestionably serious works largely withered, and that most of the legal battles concerned the kinds of material more commonly taken to be pornographic.

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[13] Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930).

[14] Hannegan v. Esquire, 327 U.S. 146 (1946)

This active Supreme Court scrutiny had its roots in the 1957 case of Roth v. United States,[15] discussed at length in Chapter 3 of this Part, in which the First Amendment was first taken to limit the particular works that could be found obscene. By the 1960s, cases such as Jacobellis v. Ohio[16] had made this close scrutiny a reality, and by 1966 the range of permissible regulation could properly be described as "minimal." In that year the Supreme Court decided the case of Memoirs v. Massachusetts,[17] which held that material could be restricted only if, among other factors, it was "utterly without redeeming social value." The stringency of this standard made legal restriction extraordinarily difficult, and shortly thereafter the Supreme Court made it even more difficult by embarking on a practice of reversing obscenity convictions with respect to a wide range of materials, many of which were quite explicit.[18] The result, therefore, was that by the late 1960s obscenity regulation became essentially dormant, with a consequent proliferation of the open availability of quite explicit materials. This trend was reinforced by the issuance in 1970 of the Report of the President's Commission on Obscenity and Pornography, which recommended against any state or federal restrictions on the material available to consenting adults. Although the Report was resoundingly rejected by President Nixon and by Congress, it nevertheless reinforced the tendency to withdraw legal restrictions in practice, which in turn was one of the factors contributing to a significant growth from the late 1960s onward of the volume and explicitness of materials that were widely available.

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[15] 354 U.S. 476 (1957)

[16] 378 U.S. 184 (1964).

The Supreme Court decisions of 1973, most notably Paris

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[17] 383 U.S. 413 (1966).

[18] E.g., Redrup v. New York, 386 U.S. 767 (1967).

Adult Theatres I v. Slaton[19] and Miller v. California,[20] by reversing the "utterly without redeeming social value" standard and by making clear once again that the First Amendment did not protect anything and everything that might be sold to or viewed by a consenting adult, tended to recreate the environment in which obscenity regulation was a practical possibility. Since 1973, however, the extent of obscenity regulation has varied widely throughout the country. In some geographic areas aggressive prosecution has ended the open availability of most extremely explicit materials, but more commonly prosecution remains minimal, and highly explicit materials are widely available. Because the current situation is explored throughout this Report, and because it is described in detail in a later part, we will go no further in this Chapter, whose primary purpose has been to put the present into historical perspective.

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[19] 413 U.S. 49 (1973).

[20] 413 U.S. 15 (1973).

## Chapter 3

## The Constraints Of The First Amendment

3.1 The Presumptive Relevance of the First Amendment The subject of pornography is not coextensive with the subject of sex. Definitionally, pornography requires a portrayal, whether spoken, written, printed, photographed, sculpted, or drawn, and this essential feature of pornography necessarily implicates constitutional concerns that would not otherwise exist. The First Amendment to the Constitution of the United States provides quite simply that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Longstanding judicial interpretations make it now clear that this mandate is, because of the Fourteenth Amendment, applicable to the states as well,[21] and make it equally clear that the restrictions of the First Amendment are applicable to any form of governmental action, and not merely to statutes enacted by a legislative body.22

To the extent, therefore, that regulation of pornography constitutes an abridgment of the freedom of speech, or an abridgment of the freedom of the press, it is at least presumptively unconstitutional. And even if some or all forms of regulation of pornography are seen ultimately not to constitute abridgments of the freedom of speech or the freedom of the press, the fact remains that the Constitution treats speaking and printing as special, and thus the regulation of anything spoken or printed must be examined with extraordinary care. For even when some forms of regulation of what is spoken or printed are not abridgments of the freedom of speech, or abridgments of the freedom of the press, such regulations are closer to constituting abridgments than other forms of governmental action. If nothing else, the barriers between permissible restrictions on what is said or printed and unconstitutional abridgments must be scrupulously guarded.

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[21] Gitlow v. New York, 268 U.S. 652 (1925).

[22] E.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

Thus, we start with the presumption that the First Amendment is germane to our inquiry, and we start as well with the presumption that, both as citizens and as governmental officials who have sworn an oath to uphold and defend the Constitution, we have independent responsibilities to consider constitutional issues in our deliberations and in our conclusions. Although we are not free to take actions that relevant Supreme Court interpretations of the Constitution tell us we cannot take, we do not consider Supreme Court opinions as relieving us of our own constitutional responsibilities. The view that constitutional concerns are only for the Supreme Court, or only for courts in general, is simply fallacious, and we do no service to the Constitution by adopting the view that the Constitution is someone else's responsibility. It is our responsibility, and we have treated it as such both in this Report and throughout our deliberations.

## 3.2 The First Amendment, The Supreme Court, and the Regulation of Obscenity

Although both speaking and printing are what the First Amendment is all about, closer examination reveals that the First Amendment cannot plausibly be taken to protect, or even to be relevant to, every act of speaking or writing. Government may plainly sanction the written acts of writing checks backed by insufficient funds, filing income tax returns that understate income or overstate deductions, and describing securities or consumer products in false or misleading terms. In none of these cases would First Amendment defenses even be taken seriously. The same can be said about sanctions against spoken acts such as lying while under oath, or committing most acts of criminal conspiracy. Although urging the public to rise up and overthrow the government is protected by the First Amendment, urging your brother to kill your father so that you can split the insurance money has never been considered the kind of spoken activity with which the First Amendment is concerned. Providing information to the public about the misdeeds of their political leaders is central to the First Amendment, but providing information to one's friends about the combination to the vault at the local bank is not a First Amendment matter at all.

The regulation of pornography in light of the constraints of the First Amendment must thus be considered against this background - that not every use of words, pictures, or a printing press automatically triggers protection by the First Amendment.

Indeed, as the examples above demonstrate, many uses of words, pictures, or a printing press do not even raise First Amendment concerns. As Justice Holmes stated the matter in 1919, "the First Amendment . . . cannot have been, and obviously was not, intended to give immunity for every possible use of language."[23] As described in Chapter 2 of this part, both the states and the federal government have long regulated the trade in sexually explicit materials under the label of "obscenity" regulation. And until 1957, obscenity regulation was treated as one of those forms of regulation that was totally unrelated to the concerns or the constraints of the First Amendment. If the aim of the state or federal regulation was the control of obscenity, then the First Amendment did not restrict government action, without regard to what particular materials might be deemed obscene and thus prohibited.[24] When, throughout the first half of this century, states would determine to be obscene such works as Theodore Dreiser's An American Tragedy,[25] or D.H. Lawrence's Lady Chatterley's Lover,[26] or Erskine Caldwell's God's Little Acre,[27] or Radclyffe Hall's The Well of Loneliness,[28] the First

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[23] Frohwerk v. United States, 249 U.S. 204 (1919).

[24] Dunlap v. United States, 165 U.S. 486 (1897).

[25] Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930).

[26] People v. Dial Press, 182 Misc. 416 (N.Y. Magis. Ct. 1929).

[27] Attorney General v. Book Named "God's Little Acre," 326 Mass. 281, 93 N.E.2d 819 (1950).

Amendment was not taken to constitute a significant barrier to such actions.

In 1957, however, in Roth v. United States,[29] the Supreme Court confronted squarely the tension between the regulation of what was alleged to be obscene and the constraints of the First Amendment. After Roth, it is not simply the form of regulation that immunizes a prosecution from the First Amendment. The Court made clear in Roth, and even clearer in subsequent cases,[30] that the simple designation of a prosecution as one for obscenity does not cause the First Amendment considerations to drop out. If the particular materials prosecuted are themselves protected by the First Amendment, the prosecution is impermissible. After Roth mere labels could not be used to justify restricting the protected, and mere labels could not justify circumventing the protections of the First Amendment.

But the Supreme Court also made clear in Roth that some materials were themselves outside of the coverage of the First Amendment, and that obscenity, carefully delineated, could be considered as "utterly without redeeming social importance." As a result, the Court concluded, obscene materials were not the kind of speech or press included within the First Amendment, and could thus be regulated without the kind of overwhelming evidence of

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[28] People v. Seltzer, 122 Misc. 329, 203 N.Y.S. 809 (N.Y. Sup. Ct. 1924).

[29] 354 U.S. 476 (1957).

[30] E.g., Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959).

harm that would be necessary if materials of this variety were included within the scope of the First Amendment. But to the Court in Roth, that scope was limited to material containing ideas. All ideas, even the unorthodox, even the controversial, and even the hateful, were within the scope of the First Amendment. But if there were no ideas with "even the slightest redeeming social importance," then such material could be taken to be not speech in the relevant sense at all, and therefore outside of the realm of the First Amendment.

The general Roth approach to obscenity regulation has been adhered to ever since 1957, and remains still today the foundation of the somewhat more complex but nevertheless fundamentally similar treatment of obscenity by the Supreme Court. This treatment involves two major principles. The first, reiterated repeatedly and explained most thoroughly in Paris Adult Theatre I v. Slaton,[31] is the principle that legal obscenity is treated as being either not speech at all, or at least not the kind of speech that is within the purview of any of the diverse aims and principles of the First Amendment. As a result, legal obscenity may be regulated by the states and by the federal government without having to meet the especially stringent standards of justification, often generalized as a "clear and present danger," and occasionally as a "compelling interest," that would be applicable to speech, including a great deal of sexually oriented or sexually explicit speech, that is within the aims and principles of the First Amendment. Instead, legal obscenity may constitutionally be regulated as long as there exists merely a "rational basis" for the regulation, a standard undoubtedly drastically less stringent than the standard of "clear and present danger" or "compelling interest."

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[31] 413 U.S. 49 (1973).

That legal obscenity may be regulated by the states and the federal government pursuant to Roth and Paris does not, of course, mean that the states must regulate it, or even that they necessarily should regulate it. It is in the nature of our constitutional system that most of what the Constitution does is to establish structures and to set up outer boundaries of permissible regulation, without in any way addressing what ought to be done within those outer boundaries. There is no doubt, for example, that the speed limits on the highways could be significantly reduced without offending the Constitution, that states could eliminate all penalties for burglary without violating the Constitution, and that the highest marginal income tax rate could be increased from fifty percent to ninety percent without creating a valid constitutional challenge. None of these proposals seems a particularly good idea, and that is precisely the point - that the fact that an action is constitutional does not mean that it is wise. Thus, although the regulation of obscenity is, as a result of Roth, Paris, and many other cases, constitutionally permissible, this does not answer the question whether such regulation is desireable. Wisdom or desirability are not primarily constitutional questions.

Thus the first major principle is the constitutional permissibility of the regulation of obscenity. The second major principle is that the definition of what is obscene, as well as the determination of what in particular cases is obscene, is itself a matter of constitutional law. If the underpinnings of the exclusion of obscenity from the scope of the First Amendment are that obscenity is not what the First Amendment is all about, then special care must be taken to ensure that materials, including materials dealing with sex, that are within what the First Amendment is all about are not subject to restriction. Although what is on the unprotected side of the line between the legally obscene and constitutionally protected speech is not protected by the First Amendment, the location of the line itself is a constitutional matter. That obscenity may be regulated consistent with the First Amendment does not mean that anything that is perceived by people or by legislatures as obscene may be so regulated.

As a result, the definition of obscenity is largely a question of constitutional law, and the current constitutionally permissible definition is found in another 1973 case, Miller v. California.[32] According to Miller, material is obscene if all three of the following conditions are met:

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[32] 413 U.S. 15 (1973). Among the most significant aspects of Miller was the fact that it rejected as part of the definition of obscenity the requirement that before material could be deemed obscene it had to be shown to be "utterly without redeeming social value." This standard, which had its roots as part of the test for obscenity in Memoirs v. Massachusetts, 383 U.S. 413.

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest [in sex]; and
2. the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and
3. the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

It is not our function in this Report to provide an exposition of the law of obscenity. In a later part of this Report we do provide a much more detailed treatment of the current state of the law that we hope will be useful to those with a need to consider some of the details of obscenity law. But we do not wish our avoidance of extensive description of the law here to imply that the law is simple. Virtually every word and phrase in the Miller test has been the subject of extensive litigation and substantial commentary in the legal literature. The result of this is that there is now a large body of explanation and clarification of concepts such as "taken as a whole," "prurient interest," "patently offensive," "serious value," and "contemporary community standards." Moreover, there are many constitutionally mandated aspects of obscenity law that are not derived directly from the definition of obscenity. For example, no person may be prosecuted for an obscenity offense unless it can be shown that the person had knowledge of the general contents, character, and nature of the materials involved, for if the law were otherwise booksellers and others would avoid stocking anything even slightly sexually oriented for fear of being prosecuted on account of materials the content of which they were unaware.[33] The procedures surrounding the initiation of a prosecution, including search and seizure, are also limited by constitutional considerations designed to prevent what would in effect be total suppression prior to a judicial determination of obscenity.[34] And the entire subject of child pornography, which we discuss in Chapter 7 of this Part, is governed by different principles and substantially different legal standards.

The constitutionally-based definition of obscenity is enforced not only by requiring that that definition be used in obscenity trials, but also, and more importantly, by close judicial scrutiny of materials determined to be obscene. This scrutiny, at both trial and appellate levels, is designed to ensure that non-obscene material is not erroneously determined to be obscene. The leading case here is the 1974 unanimous Supreme Court decision in Jenkins v. Georgia,[35] which involved a conviction in Georgia of the Hollywood motion picture Carnal Knowledge. In reversing the conviction, the Supreme Court made clear that regardless of what the local community standards of that community may have been, the First Amendment prohibited any community, regardless of its standards, from finding that a motion picture such as this appealed to the prurient interest or was patently offensive.[36] Thus, although appeal to the prurient interest and patent offensiveness are to be determined in the first instance by reference to local standards, it is clear after Jenkins that the range of local variation that the Supreme Court will permit consistent with the First Amendment is in fact quite limited.

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[33] Smith v. California, 361 U.S. 147 (1959). The principle was reaffirmed in Hamling v. United States, 418 U.S. 87 (1974), which also made clear that the defendant need not be shown to have known that the materials were legally obscene.

[34] See, Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973).

[35] 418 U.S. 153 (1974).

In the final analysis, the effect of Miller, Jenkins, and a large number of other Supreme Court and lower court cases is to limit obscenity prosecutions to "hard core"[37] material devoid of anything except the most explicit and offensive representations of sex. As we explained in our Introduction to this part, we believe that the late Justice Stewart was more perceptive than he has been given credit for having been in saying of hard-core pornography that he knew it when he saw it.[38] Now that we have seen much of it, we are all confident that we too know it when we see it, but we also know that others have used this and other terms to encompass a range of materials wider than that which the Supreme Court permits to be restricted, and wider than that which most of us think ought to be restricted. But it should be plain both from the law, and from inspection of the kinds of material that the law has allowed to be prosecuted, that only the most thoroughly explicit materials, overwhelmingly devoted to patently offensive and explicit representations, and unmitigated by any significant amount of anything else, can be and are in fact determined to be legally obscene.

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[36] The third facet of the Miller test, that the work lack "serious literary, artistic, political, or scientific value," is never in any event to be determined by reference to local standards. Here the frame of reference must in all cases be national. Smith v. United States, 431 U.S. 291 (1977).

[37] The Supreme Court in fact uses the term in Miller.

[38] "I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

### 3.3 Is the Supreme Court Right?

We cannot ignore our own obligations not to recommend what we believe to be unconstitutional. Numerous people, in both oral and written evidence, have urged upon us the view that the Supreme Court's approach is a mistaken interpretation of the First Amendment. They have argued that we should conclude that any criminal prosecution based on the distribution[39] to consenting adults of sexually explicit material, no matter how offensive to some, and no matter how hard-core, and no matter how devoid of literary, artistic, political, or scientific value, is impermissible under the First Amendment.

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[39] We do not in this Report discuss *Stanley v. Georgia*, 394 U.S. 557 (1969), in which the Supreme Court held the mere *possession* of even legally obscene material to be constitutionally protected. We do not discuss *Stanley* because nothing we recommend is inconsistent with it, and no one has suggested to us that we should urge that *Stanley* be overruled.

We have taken these arguments seriously. In light of the facts that the Supreme Court did not in Roth or since unanimously conclude that obscenity is outside of the coverage of the First Amendment, and that its 1973 rulings were all decided by a scant 5-4 majority on this issue, there is no doubt that the issue was debatable within the Supreme Court, and thus could hardly be without difficulty. Moreover, we recognize that the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues is incorrect.[40] With dissent existing even within the Supreme Court, and with disagreement with the Supreme Court majority's approach predominant among legal scholars, we could hardly ignore the possibility that the Supreme Court might be wrong on this issue, and that we would wish to find protected that which the Supreme Court found unprotected.

There are both less and more plausible challenges to the Supreme Court's approach to obscenity. Among the least plausible, and usually more rhetorical device than serious argument, is the view that the First Amendment is in some way an "absolute," protecting, quite simply, all speech. Even Justices Black and Douglas, commonly taken to be "absolutists," would hardly have protected all spoken or written acts under the First

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[40] See, e.g., Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1; Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963); Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974).

Amendment, and on closer inspection all those accused of or confessing to "absolutism" would at the very least apply their absolutism to a range of spoken or written acts smaller than the universe of all spoken, written, or pictorial acts. This is not to deny that under the views of many, including Black and Douglas, what is now considered obscene should be within the universe of what is absolutely protected. But "absolutism" in unadulterated form seems largely a strawman, and we see no need to use it as a way of avoiding difficult questions.

Much more plausible is the view not that the First Amendment protects all spoken, written, or pictorial acts, but that all spoken, written, or pictorial acts are at least in some way covered, even if not ultimately protected, by the First Amendment. That is, even if the government may regulate some such acts, it may never do so unless it has a reason substantially better than the reasons that normally are sufficient to justify governmental action. Whether this heightened standard of justification is described as a "clear and present danger," or "compelling interest," or some standard less stringent than those, the view is still that regulating any spoken, written, or pictorial acts requires a particularly good reason. And when applied to the regulation of obscenity, so the argument goes, the reasons supplied and the empirical evidence offered remain too speculative to meet this especially high burden of justification.

Other views accept the fact that not all spoken, written, or pictorial acts need meet this especially high burden of justification. Only those acts that in some way relate to the purposes or principles of the First Amendment are covered, but, it is argued, even the hardest-core pornographic item is within the First Amendment's coverage. To some this is because both the distribution and use of such items are significant aspects of self-expression. And while not all acts of self-expression are covered by the First Amendment, acts of self-expression that take the form of books, magazines, and films are, according to the argument, so covered. These, it is argued, are the traditional media of communication, and when those media are used to express a different world view, or even merely to achieve sexual satisfaction, they remain the kinds of things towards which the First Amendment is directed. As a result, regulation of the process by which an alternative sexual vision is communicated, or regulation of the process by which people use the traditional media of communication to experience and to understand a different sexual vision, is as much a part of the First Amendment as communicating and experiencing different visions about, for example, politics or morals. A variant on this last argument, which takes obscenity to be within a range of First Amendment coverage admittedly smaller than the universe of communicative acts, looks not so much to the act or to the communication but instead to the government's reasons for regulating. If, so the argument goes, government's action in restricting is based on its reaction to a particular point of view, then the action is impermissible. Because it is the purpose of the First Amendment to allow all points of view to be expressed, an attempt by government to treat one point of view less favorably than another is unconstitutional for that reason alone, no matter how dangerous, offensive, or otherwise reprehensible the disfavored point of view may be.

We have heard witnesses articulate these various views intelligently and forcefully, and we have read more extensive versions of these arguments. They are not implausible by any means, but in the final analysis we remain unpersuaded that the fundamental direction of Roth and Paris is misguided. Indeed, we are confident that it is correct. Although we do not subscribe to the view that only political speech is covered by the First Amendment, we do not believe that a totally expansive approach is reasonable for society or conducive to preserving the particular values embodied in the First Amendment. The special power of the First Amendment ought, in our opinion, to be reserved for the conveying of arguments and information in a way that surpasses some admittedly low threshold of cognitive appeal, whether that appeal be emotive, intellectual, aesthetic, or informational. We have no doubt that this low threshold will be surpassed by a wide range of sexually explicit material conveying unpopular ideas about sex in a manner that is offensive to most people, and we accept that this is properly part of a vision of the First Amendment that is designed substantially to protect unpopular ways of saying unpopular things. But we also have little doubt that most of what we have seen that to us qualifies as hard-core material falls below this minimal threshold of cognitive or similar appeal. Lines are of course not always easy to draw, but we find it difficult to understand how much of the material we have seen can be considered to be even remotely related to an exchange of views in the marketplace of ideas, to an attempt to articulate a point of view, to an attempt to persuade, or to an attempt seriously to convey through literary or artistic means a different vision of humanity or of the world. We do not deny that in a different context and presented in a different way, material as explicit as that which we have seen could be said to contain at least some of all of these characteristics. But we also have no doubt that these goals are remote from the goals of virtually all distributors or users of this material, and we also have no doubt that these values are present in most standard pornographic items to an extraordinarily limited degree.

In light of this, we are of the opinion that not only society at large but the First Amendment itself suffers if the essential appeal of the First Amendment is dissipated on arguments related to material so tenuously associated with any of the purposes or principles of the First Amendment. We believe it necessary that the plausibility of the First Amendment be protected, and we believe it equally necessary for this society to ensure that the First Amendment retains the strength it must have when it is most needed. This strength cannot reside exclusively in the courts, but must reside as well in widespread acceptance of the importance of the First Amendment. We fear that this acceptance is jeopardized when the First Amendment too often becomes the rhetorical device by which the commercial trade in materials directed virtually exclusively at sexual arousal is defended. There is a risk that in that process public willingness to defend and to accept the First Amendment will be lost, and the likely losers will be those who would speak out harshly, provocatively, and often offensively against the prevailing order, including the prevailing order with respect to sex. The manner of presentation and distribution of most standard pornography confirms the view that at bottom the predominant use of such material is as a masturbatory aid. We do not say that there is anything necessarily wrong with that for that reason. But once the predominant use, and the appeal to that predominant use, becomes apparent, what emerges is that much of what this material involves is not so much portrayal of sex, or discussion of sex, but simply sex itself. As sex itself, the arguments for or against restriction are serious, but they are arguments properly removed from the First Amendment questions that surround primarily materials whose overwhelming use is not as a short-term masturbatory aid. Whether the state should, for example, prohibit masturbation in certain establishments that are open to the public is a question that some would wish to debate, but it is certainly not a First Amendment question. Similarly, the extent to which sex itself is and under what circumstances constitutionally protected is again an interesting and important constitutional question, but it is not usefully seen as a First Amendment question.[41]

We recognize, of course, that using a picture of sex as a masturbatory aid is different from the simple act of masturbation, or any other form of sex. The very fact that pictures and words are used compels us to take First Amendment arguments more seriously than would be the case if the debate were about prostitution. Still, when we look at the standard pornographic item in its standard context of distribution and use, we find it difficult to avoid the conclusion that this material is so far removed from any of the central purposes of the First Amendment, and so close to so much of the rest of the sex industry, that including such material within the coverage of the First Amendment seems highly attenuated.

Like any other act, the act of making, distributing, and using pornographic items contains and sends messages. For government to act against some of these items on account of the messages involved may appear as problematic under the First Amendment, but to hold that such governmental action violates the First Amendment is to preclude government from taking action in every case in which government fears that the restricted action will be copied, or proliferate because of its acceptance. Government may prosecute scofflaws because it fears the message that laws ought to be violated, and it may restrict the use of certain products in part because it does not wish the message that the product is desirable to be widely disseminated in perhaps its most effective form. So too with reference to the kind of material with which we deal here. If we are correct in our conclusion that this material is far removed from the cognitive, emotive, aesthetic, informational, persuasive, or intellectual core of the First Amendment, we are satisfied that a governmental desire to restrict the material for the messages its use sends out does not bring the material any closer to the center.

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[41] As this report is being written, the Supreme Court has under advisement after oral argument the case of Bowers v. Hardwick, 760 F.2d 1202 (11th Cir. 1985), Sup. Ct. Docket No. 85-140, challenging the constitutionality of the Georgia sodomy statute as applied to the private and consensual acts of two male homosexuals. The arguments rely primarily on constitutional claims of liberty, privacy, and freedom of association. If the Supreme Court strikes down the statute as unconstitutional, arguments other than the First Amendment might be available to challenge certain laws against certain uses of even legally obscene materials. Without such an action, however, such privacy or liberty arguments, which the Supreme Court rejected with respect to exhibition of obscene material to consenting adults in a theater in Paris, would be unlikely to succeed. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd without opinion, 425 U.S. 901 (1976).

We thus conclude not that obscenity regulation creates no First Amendment concerns, nor even that the Supreme Court's approach is necessarily correct. But we do believe the Supreme Court's approach is most likely correct, and we believe as well that arguments against the Supreme Court's approach are becoming increasingly attenuated as we focus on the kind of material commonly sold in "adults only" establishments in this country. We may be wrong, but most of us can see no good reason at the moment for substituting a less persuasive approach for the

Supreme Court's more persuasive one.

### 3.4 The Risks of Abuse

Although we are satisfied that there is a category of material so overwhelmingly preoccupied with sexual explicitness, and so overwhelmingly devoid of anything else, that its regulation does no violence to the principles underlying the First Amendment, we recognize that this cannot be the end of the First Amendment analysis. We must evaluate the possibility that in practice materials other than these will be restricted, and that the effect therefore will be the restriction of materials that are substantially closer to what the First Amendment ought to protect than the items in fact aimed at by the *Miller* definition of obscenity. We must also evaluate what is commonly referred to as the "chilling effect," the possibility that, even absent actual restriction, creators of material that is not in fact legally obscene will refrain from those creative activities, or will steer further to the safe side of the line, for fear that their protected works will mistakenly be deemed obscene. And finally we must evaluate whether the fact of restriction of obscene material will act, symbolically, to foster a "censorship mentality" that will in less immediate ways encourage or lead to various restrictions, in other contexts, of material which ought not in a free society be restricted. We have heard in one form or another from numerous organizations of publishers, booksellers, actors, and librarians, as well as from a number of individual book and magazine publishers. Although most have urged general anti-censorship sentiments upon us, their oral and written submissions have failed to provide us with evidence to support claims of excess suppression in the name of the obscenity laws, and indeed the evidence is to the contrary. The president of the Association of American Publishers testified that to his knowledge none of his members had even been threatened with enforcement of the criminal law against obscenity, and the American Library Association could find no record of any prosecution of a librarian on obscenity charges. Other groups of people involved in publishing, bookselling, or theatrical organizations relied exclusively on examples of excess censorship from periods of time no more recent than the 1940s. And still others were even less helpful, telling us, for example, that censorship was impermissible because "This is the United States, not the Soviet Union." We know that, but we know as well that difficult issues do not become easy by the use of inflammatory rhetoric. We wish that many of these people or groups had been able to provide concrete examples to support their fears of excess censorship.

Throughout recent and not so recent history, excess censorship, although not necessarily prevalent, can hardly be said not to have occurred. As a result we have not been content to rest on the hollowness of the assertions of many of those who have reminded us of this theme. If there is a problem, we have our own obligations to identify it, even if witnesses before us have been unable to do so. Yet when we do our own researches, we discover that, with few exceptions, the period from 1974 [42] to the present is marked by strikingly few actual or threatened prosecutions of material that is plainly not legally obscene. We do not say that there have been none. Attempted and unsuccessful actions against the film Caligula by the United States Customs Service, against Playboy magazine in Atlanta and several other places, and against some other plainly non-obscene publications indicate that mistakes can be made. But since 1974 such mistakes have been extremely rare, and the mistakes have all been remedied at some point in the process. While we wish there would be no mistakes, we are confident that application of Miller has been overwhelmingly limited to materials that would satisfy anyone's definition of "hard core."

Even absent successful or seriously threatened prosecutions, it still may be the case that the very possibility of such an action deters filmmakers, photographers, and writers from exercising their creative abilities to the fullest. Once it appears that the likelihood of actual or seriously threatened prosecutions is almost completely illusory, however, we are in a quandary about how to respond to these claims of "chilling." We are in no position to deny the reality of someone's fears, but in almost every case those fears are unfounded. Where, as here, the fears seem to be fears of phantom dangers, we are hard pressed to say that the law is mistaken. It is those who are afraid who are mistaken. At least for the past ten years, no even remotely serious author, photographer, or filmmaker has had anything real to fear from the obscenity laws. The line between what is legally obscene and what is not is now so far away from their work that even substantially mistaken applications of current law would leave these individuals untouched. In light of that, we do not see their fears, however real to them, as a sufficient reason now to reconsider our views about the extent of First Amendment protection.

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[42] 1974 seems the most relevant date because that was the year in which the Supreme Court, in Jenkins v. Georgia, 418 U.S. 153 (1974), made it clear that determinations of obscenity were not primarily a matter of local discretion.

Much more serious, much more real, and much less in our control, is the extent to which non-governmental or governmental but non-prohibitory actions may substantially influence what is published and what is not. What television scriptwriters write is in reality controlled by what television producers will buy, which is in turn controlled by what sponsors will sponsor and what viewers will view. Screenwriters may be effectively censored by the extent to which producers or studios desire to gain an "R" rating rather than an "X," or a "PG" rather than an "R," or an "R" rather than a "PG." Book and magazine writers and publishers are restricted by what stores are willing to sell, and stores are restricted by what people are willing to buy. Writers of textbooks are in a sense censored by what school districts are willing to buy, authors are censored by what both bookstores and librarians are willing to offer, and librarians are censored by what boards of trustees are willing to tolerate.

In all of these settings there have been excesses. But every one of these settings involves some inevitable choice based on content. We think it unfortunate when Catcher in the Rye is unavailable in a high school library, but none of us would criticize the decision to keep Lady Chatterley's Lover, plainly protected by the First Amendment, out of the junior high schools. We regret that legitimate bookstores have been pressured to remove from their shelves legitimate and serious discussions of sexuality, but none of us would presume to tell a Catholic bookseller that in choosing books he should not discriminate against books favoring abortion. Motion picture studios are unable to support an infinite number of screenwriters, and their choice to support those who write about families rather than about homosexuality, for example, is not only permissible, but is indeed itself protected by the First Amendment.

Where there have been excesses, and we do not ignore the extent to which the number of those excesses seems to be increasing, they seem often attributable to the plainly mistaken notion that the idea of "community standards" is a carte blanche to communities to determine entirely for themselves what is obscene. As we have tried once again to make clear in this report, nothing could be further from the truth. Apart from this, however, the excesses that have been reported to us are excesses that can only remotely be attributed to the obscenity laws. In a world of choice and of scarce resources, every one of these excesses could take place even were there no obscenity laws

at all. In a world without obscenity law, television producer
motion picture studios, public library trustees, boards
education, convenience stores, and bookstores could still a
choose to avoid any mention or discussion of sex entirely. A
in a world without obscenity laws, all of these institutions a
others could and would still make censorious choices based
their own views about politics, morals, religion, or scienc
Thus, the link between obscenity law and the excess narrownes
at times, of the choices made by private industry as well
government is far from direct.

Although the link is not direct, we are in no position
deny that there may be some psychological connection betwe
obscenity laws and their enforcement and a general percepti
that non-governmental restriction of anything dealing with sex
justifiable. We find the connection unjustifiable, but that
not to say that it may not exist in the world. But just
vigorous and vocal enforcement of robbery laws may create th
environment in which vigilantes feel justified in punishi
offenders outside of legal processes, so too may obscenity l
create an environment in which discussions of sexuality a
effectively stifled. But we cannot ignore the extent to whic
much of this stifling, to the extent it exists, is no more th
the exercise by citizens of their First Amendment rights to buy
what they want to buy, and the exercise by others of Firs
Amendment rights to sell or make what they wish. Choices are no
always exercised wisely, but the leap from some unwise choices t

the unconstitutionality of criminal laws only remotely related to those unwise choices is too big a leap for us to make.

## Chapter 4

## The Market And The Industry

### 4.1 The Market for Sexual Explicitness

More than in 1957, when the law of obscenity became inextricably a part of constitutional law, more than in 1970, when the President's Commission on Obscenity and Pornography issued its report, and indeed more than just a year ago in 1985, we live in a society unquestionably pervaded by sexual explicitness. In virtually every medium, from books to magazines to newspapers to music to radio to network television to cable television, matters relating to sex are discussed, described, and depicted with a frankness and an explicitness of detail that has accelerated dramatically within a comparatively short period of time. To attempt to isolate the causes of this phenomenon is inevitably to embark on a futile enterprise, for the sexual openness of contemporary America is unquestionably a product of that immense interplay of factors that makes contemporary America what it is in numerous aspects apart from sexual explicitness.

We have spent much of our time investigating the nature of the industry that produces, distributes, and sells sexually explicit materials, for we do not believe we could responsibly have drawn conclusions relating to that industry unless we became familiar with it. The results of this investigation are set out comprehensively and in detail in a later Part of this Report, but we feel nevertheless that a general overview of the market and the industry is necessary here.

The pervasiveness of sexual explicitness in the society in which we live underscores the importance of distinguishing what might plausibly be characterized as "pornographic" from the entire range of descriptions, depictions, and discussions that are more sexually explicit than would have been the case in earlier times, and that, for that reason, engender some or substantial objection from various people within the society. We find it useful in this Report to describe some particularly salient aspects of the pornography industry, but any such discussion must be preceded by a brief survey of some other forms of sexually explicit material that are usefully contrasted with the more unquestionably pornographic.

### 4.1.1 The Motion Picture Industry

With few exceptions, what might be called the "mainstream" or "legitimate" or "Hollywood" motion picture industry does not produce the kinds of films that would commonly be made available in "adults only" outlets. The films shown in such establishments, the ones containing little if any plot, unalloyed explicitness, and little other than an intent to arouse, are not the products of the motion picture industry with which most people are familiar. Nevertheless, sexuality, in varying degrees of explicitness or, to many, offensiveness, is a significant part of many mainstream motion pictures. One result of this phenomenon has been the rating system of the MPAA. Because those ratings are so frequently used as shorthand, and frequently erroneous shorthand, for certain forms of content, a brief description of the rating system may be in order.

The rating system, established in 1968, has no legal force, but is designed to provide information for distributors, exhibitors, and viewers of motion pictures. At the present time there are five different categories within the rating system. Motion pictures rated "G" are considered suitable for everyone, and people of all ages are admitted when such films are shown. The "PG" rating, which stands for "parental guidance suggested," still allows all to be admitted, but warns parents that some material may not be suitable for children. Films receive a PG rating if there is more than minimal violence, if there is brief nudity, or if there are non-explicit scenes involving sex. A "PG-13" rating is used where more parental caution is suggested, especially with respect to children under the age of thirteen.

Most germane to this Report are the ratings of "R" and "X." An "R" rating indicates a restricted film, and those under the age of seventeen are admitted only if accompanied by a parent or guardian. Motion pictures with this rating may be somewhat, substantially, or exclusively devoted to themes of sex or violence. They may contain harsh language, sexual activity, and nudity. Films with this rating, however, do not contain explicit sexual activity. If a film contains explicit sexual activity, or if, in some cases, it contains particularly extreme quantities and varieties of violence, it is rated "X," and no one under the age of seventeen may be admitted.

Only in rare cases will anything resembling standard pornographic fare be submitted to the MPAA for a rating. More often such material will have a self-rated "X" designation, or will have no rating, or will have some unofficial promotional rating such as "XXX." It is important to recognize, however, that although no motion picture not submitted to the MPAA can have any rating other than "X," and that although standard pornographic items would unquestionably receive an "X" rating if submitted, not all, and indeed, not many *officially* "X" rated motion pictures would commonly be considered to be pornographic. Although the nature of what kind of content will get what rating will change with the times, it remains the case that the "X" rating, especially when applied to the small number of mainstream films that officially receive that rating after submission to the MPAA, is not in every case synonymous with what most people would consider pornography.

### 4.1.2 Sexually Explicit Magazines

Although the sexual content of large numbers of magazines has increased in recent years, particular attention is often focused on so called "men's" magazines, commonly referred to within the trade as "male sophisticate" magazines. In recent years variations aimed at a female audience have also appeared, but the genre remains largely directed to men.

Magazines of this variety tend to be produced and distributed in a manner not dissimilar to the production and distribution methods for most mass-circulation magazines. It is almost misleading to consider them as one category, however, for such magazines vary enormously in content and explicitness. A very few magazines of this variety combine their sexual content with a substantial amount of non-sexually oriented, and frequently quite serious, textual or photographic matter. Some magazines have for their photographs little more than suggestive nudity, while a number of others feature significant amounts of simulated or actual sexual activity. From the perspective we adopt and explain in Chapter 5 of this Part, all of the magazines in this category contain at least some material that we would consider "degrading." Some contain a large amount of such degrading material, and some also contain sexually violent material.

With respect to the category of the legally obscene, some of the magazines in this category could not plausibly be considered legally obscene, while others have occasionally been determined to be legally obscene by particular courts. As a purely empirical matter, such determinations of obscenity for even the most explicit and offensive of these magazines seem aberrational, and by and large most of these magazines circulate widely throughout the country without significant legal attack.

### 4.1.3 Television

Television has become technologically more diverse than in earlier years, and it is no longer possible even to think of television as one medium. Broadcast television, whether network or local, has a frequent explicit or implicit sexual orientation but, with only the rarest exceptions, sexual activity of any explicitness at all, or even frontal nudity, has been large absent from broadcast television. In part this is explained rules and regulatory practices of the Federal Communicatio Commission, and in part this is explained by the practices stations, networks, and, sponsors. But whatever the cause, t amount of nudity, sexual innuendo, and sex itself on broadca television has traditionally been a far cry from even modera levels of sexual explicitness, although it is plainly the ca that the degree of sexual explicitness in depiction, in them and in language on broadcast television has been increasi substantially in recent years.

Cable television, however, by which we include satellite well, is quite different. Under current law, cable is n subject to the same range of Federal Communications Commissi content regulation, and as a result is often substantially mo sexually explicit than anything that would be available broadcast television. This increased explicitness may take t form of talk shows or call-in shows specializing in sexu advice, music videos featuring strong sexual and violent themes cable channels that specialize in sexual fare, and more genera purpose cable channels may offer mainstream motion pictures th would not in uncut form be shown on broadcast television Although some motion pictures available on cable might be deeme legally obscene in some areas, and although much of this materia is highly explicit and offensive to many, by and large th sexually explicit material available on cable would not be of th type likely to be determined to be legally obscene. More often, what is available, and it does vary from area to area and channel to channel, is a degree of sexuality somewhat closer to what is available in a mainstream motion picture theater, but would not be available on broadcast television.

In some sense the video tape cassette ought to be considered a form of television, since the television is the device by which such cassettes are viewed. But the cassettes themselves are so variable in content that generalization is difficult. Much of what people rent or, less frequently, buy to watch at home is standard motion picture theater fare, and therefore can encompass anything from the kinds of films that are rated "G" to the kinds of films that are rated "R," and occasionally the kinds of films that are officially rated "X" by the MPAA. In many video outlets, however, a range of even more sexually explicit material is available, not dissimilar to what might be shown in an "adults only" theater. Although much of this material would commonly be considered pornographic, and although much of it might in some areas be found to be legally obscene, it has in the past tended to be more on the conventional end of such material, obviously reflecting the desires of patrons of an establishment offering a full range of video material. More recently, however, some less conventional material has become available in some full range video outlets. Finally, there is the material available either in "adults only" establishments offering many types of materials, or in "adults only" outlets offering only video tapes. This material, although viewed at home, is for all practical purposes the same as that which would be shown in "adults only" theaters or peep shows, and the same range of sexual themes and practices is commonly available.

## 4.2 The Pornography Industry

In terms of methods of production, methods of distribution, and methods of ultimate sale to consumers, the pornography industry itself must be distinguished from the outlets for some degree of sexual explicitness discussed in the previous section. The true pornography industry is quite simply different from and separate from the industry that publishes "men's" magazines, the industry that offers some degree of sexually oriented material o broadcast and cable television, and the mainstream motion pictur industry. In some rare instances there may be some linkage between the two, but in general little more than confusion i served by concentrating on the these linkages rather than on th major differences.

### 4.2.1 The Production of Films, Video Tapes, and Magazines

There can be little doubt that there has within the last t to twenty years been a dramatic increase in the size of th industry producing the kinds of sexually explicit materials tha would generally be conceded to be pornographic. One consequen of this is that the industry is not as clandestine as it was earlier years. Nevertheless, when this industry is compared t the kinds of industries that produce more mainstream material it is still the case that the production of pornograph materials is a practice and a business that remains substantially "underground."

Approximately eighty percent of the American production of this type of motion picture and video tape takes place in and around Los Angeles, California. In part this is a consequence of the location there of technical personnel, such as camera operators, who either are, have been, or wish to be employed in the mainstream motion picture industry. Indeed, this description applies as well to many of the performers in these films, although, unlike technical personnel, the likelihood of a performer who is involved in pornographic materials simultaneously or eventually working in the mainstream motion picture industry is minuscule.

Production of these materials tends to be done on a rather limited budget, usually in temporary locations such as motel rooms or rented houses, and usually in quite a short period of time. Often not only the premises, but the photographic equipment as well, is rented for only the limited time necessary to make the film. It is not uncommon for producer, director, and scriptwriter to be the same person. In many cases the performers are secured through one of a number of agents who specialize in securing performers for highly sexually explicit films. Although there is virtually no overlap between this industry and the mainstream film industry, the method of securing performers for films is largely similar, with agents providing producers with books describing various performers, and with producers often interviewing a number of possible performers before selecting the ones to be used.

As this Report is being written, the technological nature of the industry is in the midst of transition from photographic motion pictures to video tape. The proliferation of the home video tape recorder is in many respects transforming the industry, and in addition the process of producing a video tape tends to be more efficient and less expensive than the process of producing a photographic motion picture. With respect to aspects of production that are not technical, however, this technological development has had little effect on the production side of the industry.

The production of the standard variety of pornographic magazine, the kind likely to be sold in an "adults only" establishment for a rather high price, is in many respects similar to the production of pornographic motion pictures and video tapes. The process again operates in a partially clandestine manner, although it is much more likely here that the production and distribution processes will be combined. When this is the case, taking the photographs, assembling them with some amount of textual material, and physically manufacturing the magazine will all take place at the same location.

With respect to the business of producing pornographic paperback books containing nothing but text, the writing, production, and distribution processes are again likely to be combined. Although independent authors are occasionally used, more common is the use of a full-time staff of authors, employed by the producer to write this kind of book at a rapid rate.

### 4.2.2 Channels of Distribution

The process of distribution of films is rapidly in the process of becoming history. The photographic motion picture film typically shown in "adults only" theaters is rapidly decreasing in popularity, along with the theaters themselves, as the video tape cassette becomes the dominant mode of presentation of non-still material. Many of these video tapes are sold or rented for home consumption, and many are shown in "peep show" establishments. The effect of this is that the "adults only" theater, in any event an expensive operation, and one that is more visible than many patrons would like, is becoming an increasing rarity. Similar trends are apparent with respect to mainstream motion pictures and the theaters in which they are shown as well, although the effect of video tape on the pornographic film industry is much more dramatic, probably owing in large part to the fact that a night out at the movies remains substantially more socially acceptable in contemporary America than a night out at the peep show.

The films that are shown in "adults only" theaters, or that are shown by use of traditional projection equipment in peep shows, tend to be distributed nationally by use of complex and sophisticated distribution networks concentrating exclusively on highly sexually explicit material There are exceptions to this generalization and one reason for the attention that focused in

pages tightly bound

the early 1970s on films such as "Deep Throat," "The Devil in Miss Jones," and "Behind the Green Door" was that the standard methods of distribution and exhibition were changed so that films such as these were shown in theaters usually showing more mainstream films. But apart from exceptions such as these, most of the chain of distribution involves producers who deal only in this kind of material, distributors and wholesalers whose entire business is devoted to highly sexually explicit materials, and theaters or peep shows catering exclusively to adults desiring access to very sexually explicit material.

With respect to video tapes, most of the distribution is on a national scale, and most of that national distribution is controlled by a relatively limited number of enterprises. These distributors duplicate in large quantities the tapes they have purchased from producers, and then sell them to wholesalers, frequently with some promotional materials, who in turn sell them to retailers specializing in this type of material, or to more generally oriented video retailers who will include some of this material along with their more mainstream offerings. Based on the evidence provided to us, it appears as if perhaps as many as half of all of the general video retailers in the country include within their offerings at least some material that, by itself, would commonly be conceded to be pornographic.

Magazines are also distributed nationally, and again are likely first to be sold to wholesalers who will then sell to retailers. This process, however, likely culminating in a sale at an "adults only" outlet, does not account for as high a proportion of the total sales as it does for films or video tapes. Moreso than for films or tapes, many of the magazines are sold by mail, usually as a result of advertisements placed in similar magazines, in pornographic books containing text, and even in more mainstream but sexually oriented publications. There is some indication that the video tape has hurt the pornographic magazine industry as well as the pornographic motion picture industry. The retail prices for such magazines, within the recent past commonly in the range of from ten to twenty-five dollars per magazine, are in some geographical areas likely to be substantially discounted, and adult establishments appear to be offering an increasing percentage of video tapes and a decreasing percentage of books and magazines.

### 4.2.3 The Retail Level

Apart from mail order, and apart from the rental of pornographic video tapes in general use video retail outlets, most pornographic material reaches the consumer through retail establishments specializing in this material. These outlets, which we refer to as "adults only" outlets or establishments, usually limit entry to those eighteen years of age or older, but the strictness of the enforcement of the limitation to adults varies considerably from outlet to outlet. At times these retail outlets will take the form of theaters in which only material of this variety is shown, and at times they will be "adults only" outlets specializing in books and magazines. Increasingly, however, the peep show, often combined with an outlet for the sale of pornographic books and magazines, is a major form of meeting consumer demand.

The typical peep show is located on the premises of an "adults only" establishment selling large numbers of pornographic magazines, along with some other items, such as pornographic text-only books, sexual paraphernalia, sexually oriented newspapers, and video tapes. The peep show is often separated by a doorway or screen from the rest of the establishment, and consists of a number of booths in which a film, or, more likely now, a video tape, can be viewed. The patron inserts tokens into a slot for a certain amount of viewing time, and the patron is usually alone or with one other person within the particular booth. The peep show serves the purpose of allowing patrons to masturbate or to engage in sexual activity with others in some degree of privacy, at least compared to an adult theater, while watching the pornographic material. In a later of our report describing these establishments we note in detail the generally unsanitary conditions in such establishments. The booths seem rarely to be cleaned, and the evidence of frequent sexual activity is apparent. Peep shows are a particularly common location for male homosexual activity within and between the booths, and the material available for viewing in some of the booths is frequently oriented towards the male homosexual.

There are, of course, establishments offering adult material that do not contain peep shows. Although video tapes and various items of sexual paraphernalia are likely to be sold, the bulk of the stock of these establishments consists of pornographic magazines, frequently arranged by sexual preference. There can be little doubt that the range of sexual preferences catered to by magazines is wider than that of any other form of pornography. As the listing of titles later in this report makes clear, virtually any conceivable, and quite a few inconceivable, sexual preferences are featured in the various specialty magazines, and materials featuring sado-masochism, bestiality, urination and defecation in a sexual context, and substantially more unusual practices even than those are a significant portion of what is available.

### 4.3 The Role of Organized Crime

We have spent a considerable amount of our time attempting to determine whether there is a connection between the pornography industry and what is commonly taken to be "organized crime." After hearing from a large number of witnesses, mostly law enforcement personnel, after reading a number of reports prepared by various law enforcement agencies, and after consulting sources such as trial transcripts, published descriptions, and the like, we believe that such a connection does exist.

We recognize that the statement that there is a connection between the pornography industry and organized crime is contrary to the conclusion reached by the President's Commission on Obscenity and Pornography in 1970. That Commission concluded that:

> Although many persons have alleged that organized crime works hand-in-glove with the distributors of adult materials, there is at present no concrete evidence to support these statements. The hypothesis that organized criminal elements either control or are "moving in" on the distribution of sexually oriented materials will doubtless continue to be speculatedupon. The panel finds that there is insufficient evidence at present to warrant any conclusion in this regard.

Caution about jumping too easily to conclusions about organized crime involvement in the pornography industry was further induced by the evidence offered to us by Director William H. Webster of the Federal Bureau of Investigation. Director Webster surveyed the FBI field offices throughout the country, and reported to us that "about three quarters of those [fifty-nine] offices indicated that they have no verifiable information that organized crime was involved either directly or through extortion in the manufacture of pornography. Several offices, did, however, report some involvement by members and associates of organized crime."[43] We reach our conclusions in the face of a negative conclusion by the 1970 Commission, and in the face of the evidence provided by the FBI, not so much because we disagree, but because we feel that more careful analysis will reveal that the discrepancies are less than they may at first appear.

One leading cause of conflicting views about organized crime involvement in pornography is that there are conflicting views about what organized crime is. To many people organized crime consists of that organization or network of related organizations commonly referred to by law enforcement personnel and others as La Cosa Nostra. This organization, which we describe in much more detail later in our Report specifically addressing on organized crime, is a highly structured and elaborately subdivided organization in some way involved in an enormous range of criminal activities. It has its own hierarchy, its own formalized system of ranks and methods of advancement, and its own procedures for settling disputes. Commonly, although in our view erroneously, La Cosa Nostra and "organized crime" are synonymous.

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[43] We note, however, that a report prepared by the FBI in 1978, which is included in a later portion of this report, contains detailed information regarding various links between organized crime and the pornography industry.

To other people organized crime consists of any large and organized enterprise engaged in criminal activity, regardless of any connection with La Cosa Nostra. To the extent that enterprises have continuity and a defined membership and engage in crime, then this is considered to be organized crime.

Finally, to still others the "best" definition of organized crime lies somewhere in between. For them organized crime consists of a large and organized enterprise engaged in criminal activity, with a continuity, a structure, and a defined membership, and that is likely to use other crimes and methods of corruption, such as extortion, assault, murder, or bribery, in the service of its primary criminal enterprise.

These differences in definition are especially important with respect to identifying the connection between the pornography industry and organized crime, because much of the evidence supports the conclusion that major parts of the industry are controlled by organizations that fit the second or third but not the first of the foregoing definitions. In particular, there is strong evidence that a great deal of the pornographic film and video tape distribution, and some of the pornographic magazine distribution, is controlled by one Reuben Sturman, operating out of the Cleveland area, but with operations and controlled organizations throughout the country. Although we inevitably must rely on secondary evidence, it appears to us that Sturman's enterprise is highly organized and predominantly devoted to the vertically integrated production, distribution, and sale of materials that would most likely be determined to be legally obscene in most parts of the country. Of this we are certain, and to that extent we could say that significant parts of the pornography industry are controlled by organized crime. We also have some but less clear evidence that organizations like Sturman's, but not quite as large, play similar roles, and that all of these various organizations at times have employed other activities that themselves violate the law in order to further the production, distribution, and sale of pornographic materials. In this sense these organizations would fit the third as well as the second definition of organized crime.

We also have strong reason to believe, however, that neither Sturman's organization, nor some substantially smaller ones, are themselves part of La Cosa Nostra. In that sense this part of the industry would not fit the first of the above definitions of organized crime. We do not say that there are no connections with La Cosa Nostra. On the contrary, there seems to be evidence, frequently quite strong evidence, of working arrangements, accommodations, assistance, some sharing of funds, and the like, as well as evidence of control by La Cosa Nostra, but nothing that would justify saying that these organizations are La Cosa Nostra or are a part of La Cosa Nostra.

Much the same could be said about the relationship between smaller pornography operators and La Cosa Nostra. Again there seems little evidence of direct ownership, operation, or control, but there does seem to be a significant amount of evidence that "protection" of these smaller operators by La Cosa Nostra is both available and required. This applies in some areas to distribution, in some to production, and in some to retail outlets themselves, in much the same way that it applies frequently to many more legitimate businesses. But we are not reluctant to conclude that in many aspects of the pornography business that La Cosa Nostra is getting a piece of the action.

This is not to say that La Cosa Nostra is not itself engaged in pornography. There also seems strong evidence that significant portions of the pornographic magazine industry, the peep show industry, and the pornographic film industry are either directly operated or closely controlled by La Cosa Nostra members or very close associates. Major portions of these industries seem to be as much a part of La Cosa Nostra as any other of their activities. At times there is direct involvement by La Cosa Nostra even with the day-to-day workings of business, and in many cases there is clear control even when the everyday management is left to others. In many of the reports and other documents we have received there has been evidence to the effect that members of the Columbo, DeCavalcante, Gambino, and Luchese "families" have been actively in as well as merely associated with the production, distribution, and sale, of unquestionably pornographic materials. There is much evidence that alleged La Cosa Nostra members such as Robert DiBernardo and others are or have in the recent past been major figures in the national distribution of such materials. Although we cannot say that every piece of evidence we have received to this effect is true, the possibility that none of this cumulative evidence is true is so remote that we do not take it seriously.

As was the case with many other topics within our mandate, our lack of investigative resources has made it impossible to investigate these matters directly. Moreover, the matters to be investigated with respect to organized crime are, as has been well known for decades, so clandestine that thorough investigation without conflicting information is virtually impossible to accomplish. Nevertheless, there has been much investigation by federal and state authorities, and we have found it important to rely on those investigations. We include as an appendix to the later specific discussion of organized crime a number of those reports prepared by other law enforcement agencies. We are indebted to all of those who have worked on these reports, for without them our investigation would have been much less complete. At times there is information in these reports that we are unsure of, but we have little doubt as to the general truth of the big picture painted by these reports, and we have little hesitancy in relying on them to the extent either of agreeing with the big picture, or of agreeing with specific facts where those facts recur in consistent form in information from a number of different sources. The general picture seems clear, and we invite recourse to those specific reports to fill out this general conclusion that seems most appropriate as a statement from us.

# Chapter 5

# The Question Of Harm

## 5.1 Matters of Method

5.1.1 Harm and Regulation - The Scope of Our Inquiry A central part of our mission has been to examine the question whether pornography is harmful. In attempting to answer this question, we have made a conscious decision not to allow our examination of the harm question to be constricted by the existing legal/constitutional definition of the legally obscene. As explained in Chapter 3 of this Part, we agree with that definition in principle, and we believe that in most cases it allows criminal prosecution of what ought to be prosecuted and prohibits criminal prosecution of what most of us believe is material properly protected by the First Amendment. In light of this, our decision to look at the potential for harm in a range of material substantially broader than the legally obscene requires some explanation. One reason for this approach was the fact that in some respects existing constitutional decisions permit non-prohibitory restrictions of material other than the legally obscene. With respect to zoning, broadcast regulation, and liquor licensing, existing Supreme Court case law permits some control, short of total prohibition, of the time, place, and manner in which sexually explicit materials that are short of being legally obscene may be distributed. When these non-prohibitory techniques are used, the form of regulation is still constrained by constitutional considerations, but the regulation need not be limited only to that which has been or would be found legally obscene. To address fully the question of government regulation, therefore, requires that an examination of possible harm encompass a range of materials broader than the legally obscene.

Moreover, the range of techniques of social control is itself broader than the scope of any form of permissible or desirable governmental regulation. We discuss in Chapter 8 of this Part many of these techniques, including pervasive social condemnation, public protest, picketing, and boycotts. It is appropriate here, however, to emphasize that we do not see any necessary connection between what is protected by law (and therefore protected from law), on the one hand, and what citizens may justifiably object to and take non-governmental action against, on the other. And if it is appropriate for citizens justifiably to protest against some sexually explicit materials despite the fact that those materials are constitutionally protected, then it is appropriate for us to broaden the realm of our inquiry accordingly.[44]

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[44] With respect to the general issue of condemnation, and especially with respect to the condemnation of specific materials by name, our role as a government commission is somewhat more problematic. At some point governmental condemnation may act effectively as governmental restraint (see, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), and we are therefore more cautious in condemning specific publications by name than citizens need be. This caution, however, does not mean that we feel that governmental agencies may not properly condemn even that which they cannot control. We feel that we have both the right and the duty to condemn, in some cases, that which is properly constitutionally protected, but we do so with more caution

Most importantly, however, we categorically reject the idea that material cannot be constitutionally protected, and properly so, while still being harmful. All of us, for example, feel that the inflammatory utterances of Nazis, the Ku Klux Klan, and racists of other varieties are harmful both to the individuals to whom their epithets are directed as well as to society as a whole. Yet all of us acknowledge and most of us support the fact that the harmful speeches of these people are nevertheless constitutionally protected. That the same may hold true with respect to some sexually explicit materials was at least our working assumption in deciding to look at a range of materials broader than the legally obscene. There is no reason whatsoever to suppose that such material is necessarily harmless just because it is and should remain protected by the First Amendment. As a result, we reject the notion that an investigation of the question of harm must be restricted to material unprotected by the Constitution.

The converse of this is equally true. Just as there is no necessary connection between the constitutionally protected and the harmless, so too is there no necessary connection between the constitutionally unprotected and the harmful. We examine the harm question with respect to material that is legally obscene because even if material is legally obscene, and even if material is therefore unprotected by the First Amendment, it does not

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than is necessary when the condemnation comes from the citizenry and not the government.

follow that it is harmful. That some sexually explicit material is constitutionally regulable does not answer the question of whether anything justifies its regulation. Accordingly, we do not take our acceptance of the current constitutional approach to obscenity as diminishing the need to examine the harms purportedly associated with the distribution or use of such material.

We thus take as substantially dissimilar the question of constitutional protection and the question of harm. Even apart from constitutional issues, we also take to be separate the question of the advisability of governmental regulation, all things considered, and the question of the harmfulness of some or all sexually explicit materials. The upshot of all of this is that we feel it entirely proper to identify harms that may accompany certain sexually explicit material before and independent of an inquiry into the desirability and constitutionality of regulating even that sexually explicit material that may be harmful. As a result, our inquiry into harm encompasses much material that may not be legally obscene, and also encompasses much material that would not generally be considered "pornographic" as we use that term here.

### 5.1.2 What Counts as a Harm?

What is a harm? And why focus on harm at all? We do not wish in referring repeatedly to "harm" to burden ourselves with an unduly narrow conception of harm. To emphasize in different words what we said in the previous section, the scope of identifiable harms is broader than the scope of that with which government can or should deal. We refuse to truncate our consideration of the question of harm by defining harms in terms of possible government regulation. And we certainly reject the view that the only noticeable harm is one that causes physical or financial harm to identifiable individuals. An environment, physical, cultural, moral, or aesthetic, can be harmed, and so can a community, organization, or group be harmed independent of identifiable harms to members of that community.

Most importantly, although we have emphasized in our discussion of harms the kinds of harms that can most easily be observed and measured, the idea of harm is broader than that. To a number of us, the most important harms must be seen in moral terms, and the act of moral condemnation of that which is immoral is not merely important but essential. From this perspective there are acts that need be seen not only as causes of immorality but as manifestations of it. Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm. And when we think about harm in this way, there are acts that must be condemned not because the evils of the world will thereby be eliminated, but because conscience demands it.

We believe it useful in thinking about harms to note the distinction between harm and offense. Although the line between the two is hardly clear, most people can nevertheless imagine things that offend them, or offend others, that still would be hard to describe as harms. In Chapter 4 of this Part our discussion of laws and their enforcement will address the question of the place of governmental regulation in restricting things that some or many people may find offensive, but which are less plainly harmful, but at this point it should be sufficient to point out that we take the offensive to be well within the scope of our concerns.

In thinking about harms, it is useful to draw a rough distinction between primary and secondary harms. Primary harms are those in which the alleged harm is commonly taken to be intrinsically harmful, even though the precise way in which the harm is harmful might yet be further explored. Nevertheless, murder, rape, assault, and discrimination on the basis of race and gender are all examples of primary harms in this sense. We treat these acts as harms not because of where they will lead, but simply because of what they are.

In other instances, however, the alleged harm is secondary, not in the sense that it is in any way less important, but in the sense that the concern is not with what the act is, but where it will lead. Curfews are occasionally imposed not because there is anything wrong with people being out at night, but because in some circumstances it is thought that being out at night in large groups may cause people to commit other crimes. Possession of "burglar tools" is often prohibited because of what those tools may be used for. Thus, when it is urged that pornography is harmful because it causes some people to commit acts of sexual violence, because it causes promiscuity, because it encourages sexual relations outside of marriage, because it promotes so-called "unnatural" sexual practices, or because it leads men to treat women as existing solely for the sexual satisfaction of men, the alleged harms are secondary, again not in any sense suggesting that the harms are less important. The harms are secondary here because the allegation of harm presupposes a causal link between the act and the harm, a causal link that is superfluous if, as in the case of primary harms, the act quite simply is the harm.

Thus we think it important, with respect to every area of possible harm, to focus on whether the allegation relates to a harm that comes from the sexually explicit material itself, or whether it occurs as a result of something the material does. If it is the former, then the inquiry can focus directly on the nature of the alleged harm. But if it is the latter, then there must be a two-step inquiry. First it is necessary to determine if some hypothesized result is in fact harmful. In some cases, where the asserted consequent harm is unquestionably a harm, this step of the analysis is easy. With respect to claims that certain sexually explicit material increases the incidence of rape or other sexual violence, for example, no one could plausibly claim that such consequences were not harmful, and the inquiry can then turn to whether the causal link exists. In other cases, however, the harmfulness of the alleged harm is often debated. With respect to claims, for example, that some sexually explicit material causes promiscuity, encourages homosexuality, or legitimizes sexual practices other than vaginal intercourse, there is serious societal debate about whether the consequences themselves are harmful.

Thus, the analysis of the hypothesis that pornography causes harm must start with the identification of hypothesized harms, proceed to the determination of whether those hypothesized harms are indeed harmful, and then conclude with the examination of whether a causal link exists between the material and the harm. When the consequences of exposure to sexually explicit material are not harmful, or when there is no causal relationship between exposure to sexually explicit material and some harmful consequence, then we cannot say that the sexually explicit material is harmful. But if sexually explicit material of some variety is causally related to, or increases the incidence of, some behavior that is harmful, then it is safe to conclude that the material is harmful.

### 5.1.3 The Standard of Proof

In dealing with these questions, the standard of proof is a recurrent problem. How much evidence is needed, or how convinced should we be, before reaching the conclusion that certain sexually explicit material causes harm? The extremes of this question are easy. Whenever a causal question is even worth asking, there will never be conclusive proof that such a causal connection exists, if "conclusive" means that no other possibility exists. We note that frequently, and all too often, the claim that there is no "conclusive" proof is a claim made by someone who disagrees with the implications of the conclusion.

Few if any judgments of causality or danger are ever conclusive, and a requirement of conclusiveness is much more rhetorical device than analytical method. We therefore reject the suggestion that a causal link must be proved "conclusively" before we can identify a harm.

The opposite extreme is also easily dismissed. The fact that someone makes an assertion of fact to us is not necessarily sufficient proof of that fact, even if the assertion remains uncontradicted. We do not operate as a judge sitting in a court of law, and we require more evidence to reach an affirmative conclusion than does a judge whose sole function might in some circumstances be to determine if there is sufficient evidence to send the case to the jury. That there is a bit of evidence for a proposition is not the same as saying that the proposition has been established, and we do not reach causal conclusions in every instance in which there has been some evidence of that proposition.

Between these extremes the issues are more difficult. The reason for this is that how much proof is required is largely a function of what is to be done with an affirmative finding, and what the consequences are of proceeding on the basis of an affirmative finding. As we deal with causal assertions short of conclusive but more than merely some trifle of evidence, we have felt free to rely on less proof merely to make assertions about harm then we have required to recommend legal restrictions, and similarly we have required greater confidence in our assertions if the result was to recommend criminal penalties for a given form of behavior than we did to recommend other forms of legal restriction. Were we to have recommended criminal sanctions against material now covered by the First Amendment, we would have required proof sufficient to satisfy some variant of the "clear and present danger" standard that serves to protect the communication lying at the center of the First Amendment's guarantees from government action resting on a less certain basis.

No government could survive, however, if all of its actions were required to satisfy a "clear and present danger" standard, and we openly acknowledge that in many areas we have reached conclusions that satisfy us for the purposes for which we draw them, but which would not satisfy us if they were to be used for other purposes. That we are satisfied that the vast majority of depictions of violence in a sexually explicit manner are likely to increase the incidence of sexual violence in this country, for example, does not mean that we have concluded that the evidence is sufficient to justify governmental prohibition of materials that both meet that description and are not legally obscene.

It would be ideal if we could put our evidentiary standards into simple formulas, but that has not been possible. The standards of proof applicable to the legal process preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt - are not easily transferred into a non-judicial context. And the standards of justification of constitutional law - rational basis, compelling interest, and clear and present danger, for example - relate only to the constitutionality of governmental action, not to its advisability, nor to the standards necessary for mere warnings about harm. Thus we have felt it best to rely on the language that people ordinarily use, words like "convinced," "satisfied," and "concluded," but those words should be interpreted in light of the discussion in this section.

### 5.1.4 The Problem of Multiple Causation

The world is complex, and most consequences are "caused" by numerous factors. Are highway deaths caused by failure to wear seat belts, failure of the automobile companies to install airbags, failure of the government to require automobile companies to install airbags, alcohol, judicial leniency towards drunk drivers, speeding, and so on and on? Is heart disease caused by cigarette smoking, obesity, stress, or excess animal fat in our diets? As with most other questions of this type, the answers can only be "all of the above," and so too with the problem of pornography. We have concluded, for example, that some forms of sexually explicit material bear a causal relationship both to sexual violence and to sex discrimination, but we are hardly so naive as to suppose that were these forms of pornography to disappear the problems of sex discrimination and sexual violence would come to an end.

If this is so, then what does it mean to identify a causal relationship? It means that the evidence supports the conclusion that if there were none of the material being tested, then the incidence of the consequences would be less. We live in a world of multiple causation, and to identify a factor as a cause in such a world means only that if this factor were eliminated while everything else stayed the same then the problem would at least be lessened. In most cases it is impossible to say any more than this, although to say this is to say quite a great deal. But when we identify something as a cause, we do not deny that there are other causes, and we do not deny that some of these other causes might bear an even greater causal connection than does some form of pornography. That is, it may be, for example, and there is some evidence that points in this direction, that certain magazines focusing on guns, martial arts, and related topics bear a closer causal relationship to sexual violence than do some magazines that are, in a term we will explain shortly, "degrading." If this is true, then the amount of sexual violence would be reduced more by eliminating the weaponry magazines and keeping the degrading magazines than it would be reduced by eliminating the degrading magazines and keeping the weaponry magazines.

Why, then, do we concentrate on pornography? For one thing, that is our mission, and we have been asked to look at this problem rather than every problem in the world. We do not think that there is something less important in what we do merely because some of the consequences that concern us here are caused as well, and perhaps to a greater extent, by other stimuli. If the stark implications of the problem of multiple causation were followed to the ultimate conclusion of casting doubt on efforts relating to anything other than the "largest" cause of the largest problem, few of us could justify doing anything in our lives that was not directly related to feeding the hungry. But the world does not operate this way, and we are comfortable with the fact that we have been asked to look at some problems while others look at other problems. And we are equally comfortable with the knowledge that to say that something is one of many causes is not to say that it is not a cause. Nor is it to say that the world would not be better off if even this one cause were eliminated.

When faced with the phenomenon of multiple causation, cause is likely to be attributed to those factors that are within our power to change. Often we ignore larger causes precisely because of their size. When a cause is pervasive and intractable, we look elsewhere for remedies, and this is quite often the rational course. A careful look at the available evidence can give us some idea of where the problems are, what different factors are causing them, which remedies directed at which causes are feasible, and which remedies directed at which causes are futile, unconstitutional, or beyond available means. We acknowledge that all of the harms we identified have causes in addition to the ones we identify. But if we are correct with respect to the causes we have identified, then we can take confidence in the fact that lessening those causes will help alleviate the problem, even if lessening other causes might very well alleviate the problem to a greater extent.

### 5.1.5 The Varieties of Evidence

We have looked at a wide range of types of evidence. Some has come from personal experience of witnesses, some from professionals whose orientation is primarily clinical, some from experimental social scientists, and some from other forms of empirical science. We have not categorically refused to consider any type of evidence, choosing instead to hear it all, consider it all, and give it the weight we believe in the final analysis it deserves. No form of evidence has been useless to us, and no form is without flaws. A few words about the advantages and disadvantages of various types of evidence may help to put into perspective the conclusions we reach and the basis on which we reach them.

Most controversial has been the evidence we have received from numerous people claiming to be victims of pornography, and reporting in some way on personal experiences relating to pornography. In later portions of this Report concerned with victimization and with the performers in pornographic material we discuss this evidence in more detail. We have considered this first-hand testimony, much of it provided at great personal sacrifice, quite useful, but it is important to note that not all of the first-hand testimony has been of the same type.

Some of the first-hand testimony has come from users of pornography, and a number of witnesses have told us how they became "addicted" to pornography, or how they were led to commit sex crimes as a result of exposure to pornographic materials. Although we have not totally disregarded the evidence that has come from offenders, in many respects it was less valuable than other victim evidence and other evidence in general. Much research supports the tendency of people to externalize their own problems by looking too easily for some external source beyond their own control. As with more extensive studies based on self-reports of sex offenders, evidence relying on what an offender thought caused his problem is likely to so overstate the xternal and so understate the internal as to be of less value to s than other evidence.

Most of the people who have testified about personal xperiences, however, have not been at any point offenders, but ather have been women reporting on what men in their lives have one to them or to their children as a result of exposure to ertain sexually explicit materials. As we explained in the ntroduction, we do not deceive ourselves into thinking that the ample before us is an accurate statistical reflection of the tate of the world. Too many factors tended to place before us estimony that was by and large in the same direction and oncentrated on those who testified about the presence rather han the absence of consequences. Nevertheless, as long as one oes not draw statistical or percentage conclusions from this evidence, and we have not, it can still be important with respect to identification and description of a phenomenon. Plainly some of these witnesses were less credible or less helpful than others, but many of the stories these witnesses told were highly believable and extremely informative, leading us to think about possible harms of which some of us had previously been unaware. Many witnesses have urged us to draw conclusions about prevalence exclusively from anecdotal evidence of this variety, but we have refused to do so. But that we have refused to make invalid statistical generalizations does not mean that we cannot learn from the stories of those with personal experiences. Many of their statements are summarized in the victimization section of this Report, and we urge people to consider those statements as carefully as we did. We can and we have learned from many of these witnesses, and their testimony has provided part of the basis for our conclusions. As in many other areas of human behavior, the most complete understanding emerges when a phenomenon is viewed from multiple perspectives. One important perspective is the subjective meaning that individuals attribute to their own experiences. This perspective and the unique experiences of individuals are less amenable to objective or statistical inquiry than certain other perspectives, and thus can be valuably examined through the kinds of witnesses whose statements we summarize later in this Report.

The evidence provided by clinical professionals carries with it some of the same problems. Although filtering the evidence through a trained professional, especially one who described to us the experience of numerous cases, eliminates some of the credibility problems, the problem of statistical generalization remains. Because people without problems are not the focus of the clinician's efforts, evidence from clinical professionals focuses on the aberrational. Consequently, clinical evidence does not help very much in answering questions about the overall extent of a phenomenon, because it too is anecdotal, albeit in a more sophisticated way and based on a larger sample. Still, clinical evidence should not be faulted for not being what it does not purport to be. What it does purport to be is sensitive professional evaluation of how some people behave, what causes them to behave in that manner, and what, if anything, might change their behavior. Clinical evidence helps us to identify whether a problem exists, although it does not address the prevalence of the problem. We have looked at the clinical evidence in this light, and have frequently found it useful.

The problems of statistical generalization diminish drastically when we look to the findings of empirical social science. Here the attempt is to identify factors across a larger population, and thus many of the difficulties associated with any orm of anecdotal evidence drop out when the field of inquiry is ither an entire population, some large but relevant subset of a opulation, or an experimental group selected under some reliable ampling method.

Some of the evidence of this variety is correlational. If there is some positive statistical correlation between the prevalence of some type of material and some harmful act, then it is at least established that the two occur together more than one would expect merely from random intersection of totally independent variables. Some of the correlational evidence is less "scientific" than others, but we refuse to discount evidence merely because the researcher did not have some set of academic qualifications. For example, we have heard much evidence from law enforcement personnel that a disproportionate number of sex offenders were found to have large quantities of pornographic material in their residences. Pornographic material was found on the premises more, in the opinion of the witnesses, than one would expect to find it in the residences of a random sample of the population as a whole, in the residences of a random sample of non-offenders of the same sex, age, and socioeconomic status, or in the residences of a random sample of offenders whose offenses were not sex offenses. To the extent that we believe these witnesses, then there is a correlation between pornographic material and sex offenses. We have also read and heard evidence that is more scientific. Some of this evidence has related to entire countries, where researchers have looked for correlations between sex offenses and changes in a country's laws controlling pornography or changes in the actual prevalence of pornographic materials. Other evidence of this variety has been conducted with respect to states or regions of the United States, with attempts again being made to demonstrate correlations between use or non-use of certain sexually explicit materials and the incidence of sex crimes or other anti-social acts.

Correlational evidence suffers from its inability to establish a causal connection between the correlated phenomena. It is frequently the case that two phenomena are positively correlated precisely because they are both caused by some third phenomena.

We recognize, therefore, that a positive correlation between pornography and sex offenses does not itself establish a causal connection between the two. It may be that some other factor, some sexual or emotional imbalance, for example, might produce both excess use of pornographic materials as well as a tendency to commit sex offenses. But the fact that correlational evidence cannot definitively establish causality does not mean that it may not be some evidence of causality, and we have treated it as such. The plausibility of hypothesized independent variables causing both use of pornography and sex offenses is one factor in determining the extent to which causation can be suggested by correlational evidence. So too is the extent to which research design has attempted to exclude exactly these possible independent variables. The more this has been done, the safer it is to infer causation from correlation, but in no area has this inference been strong enough to justify reliance on correlational evidence standing alone.

The problem of the independent variable drops out when experiments are conducted under control group conditions. If a group of people are divided into two subgroups randomly, if one group is then exposed to a stimulus while the other is not, then a difference in result between the stimulus group and the control group will itself establish causation. As long as the two groups are divided randomly, and as long as the samples are large enough that randomness can be established, then any variable that might be hypothesized other than the one being tested will be present in both the stimulus group and the control group. As a result, the stimulus being tested is completely isolated, and positive results are very strong evidence of causation.

The difficulty with experimental evidence of this variety, however, is that it is virtually impossible to conduct control group experiments outside of a laboratory setting. As a result, most of the experiments are conducted on those who can be induced to be subjects in such experiments, usually college age males taking psychology courses. Even a positive result, therefore, is a positive result only, in the narrowest sense, for a population like the experimental group. Extrapolating from the experimental group to the population at large involves many of the same problems as medical researchers encounter in extrapolating from tests on laboratory animals to conclusions about human beings. The extrapolation is frequently justified, but some caution here must be exercised in at least noting that the extrapolation requires assumptions of relevant similarity between college age males and larger populations, as well as, in some cases, assumptions of causality between the effects measured in the experiment and the effects with which people are ultimately concerned.

Perhaps more significantly, enormous ethical problems surround control group experiments involving actual anti-social conduct. If the hypothesis is that exposure to certain materials has a causal relationship with rape, for example, then the "ideal" experiment would start with a relatively large group of men as subjects, would then divide the large group randomly into two groups, and would then expose one of the two groups to the pornographic materials and the other to control materials. Then the experimenter would see if the stimulus groups committed more rapes than the control group. Of course such an experiment is inconceivable, and as a result most experiments of this variety have had to find a substitute for counting sexual offenses. Some have used scientific measures of aggression or sexual arousal, some have used questionnaires reflecting self-reported tendency to commit rape or other sex offenses, some have used experiments measuring people's willingness to punish rapists, and some have used other substitutes. With respect to any experiment of this variety, drawing conclusions requires making assumptions between, for example, measured aggression and an actual increased likelihood of committing offenses. Sometimes these assumptions are justified, and sometimes they are not, but it is always an issue to be examined carefully.

One final point about the experimental evidence presented to us is in order. Even with control group experiments, the ultimate conclusions will depend on the ability of the researcher to isolate single variables. For example, where there is evidence showing a causal relationship between exposure to violent pornography and aggressive behavior, the stimulus as just described contains two elements, the violence and the sex. It may be that the cause is attributable solely to the violence, or it may be that the cause is attributable solely to the sex. Good research attempts to examine these possibilities, and we have been conscious of it as we evaluated the research presented to us.

### 5.1.6 The Need to Subdivide

Taking into account all of the foregoing methodological factors, it has become clear to all of us that excessively broad terms like "pornography" or "sexually explicit materials" are just too encompassing to reflect the results of our inquiry. That should come as no surprise. There are different varieties of sexually explicit materials, and it is hardly astonishing that some varieties may cause consequences different from those caused by other varieties.

Our views about subdivision as a process, if not about the actual divisions themselves, reflect much of the scientific evidence, and we consider the willingness of scientists to subdivide to be an important methodological advance over the efforts of earlier eras. So too with our own subdivision. We have unanimously agreed that looking at all sexually explicit materials, or even all pornographic materials, as one undifferentiated whole is unjustified by common sense, unwarranted on the evidence, and an altogether oversimplifying way of looking at a complex phenomenon. In many respects we consider this one of our most important conclusions. Our subdivisions are not intended to be definitive, and particularly with respect to the subdivision between non-violent but degrading materials and materials that are neither violent nor degrading, we recognize that some researchers and others have usually employed broader or different groupings. Further research or - thinking, or just changes in the world, may suggest finer or different divisions. To us it is embarking on the process of subdivision that is most important, and we strongly urge that further research and thinking about the question of pornography recognize initially the way in which different varieties of material may produce different consequences.

We cannot stress strongly enough that our conclusions regarding the consequences of material within a given subdivision is not a statement about all of the material within a subdivision. We are talking about classes, or categories, and our statements about categories are general statements designed to cover most but not all of what might be within a given category. Some items within a category might produce no effects, or even the opposite effects from those identified. Were we drafting laws or legal distinctions, this might be a problem, but we are not engaged in such a process here. We are identifying characteristics of classes, and looking for harms by classes, without saying that everything that is harmful should be regulated, and without saying that everything that is harmful may be regulated consistent with the Constitution.

5.2 Our Conclusions About Harm

We present in the following sections our conclusions regarding the harms we have investigated with respect to the various subdividing categories we have found most useful. To the extent that these conclusions rest on findings from the social sciences, as they do to a significant extent, we do not in this Part of the Report describe and analyze the individual studies or deal in specifics with their methodologies. For that we rely on our analysis of the social science research which is included later in this Report. Each of us has relied on different evidence from among the different categories of evidence, and specific studies that some of us have found persuasive have been less persuasive to others of us. Similarly, some of us have found evidence of a certain type particularly valuable, while others of us have found other varieties of evidence more enlightening. And in many instances we have relied on certain evidence despite some flaws it may have contained, for it is the case that all of us have reached our conclusions about harms by assimilating and amalgamating a large amount of evidence. Many studies and statements of witnesses have both advantages and disadvantages, and often the disadvantages of one study or piece of testimony has been remedied by another. Thus, the conclusions we reach cannot be identified with complete acceptance or complete rejection by all of us of any particular item of evidence. As a result, we consider the social science analysis, which is much more specific than what we say in this section, to be an integral part of this Report, and we urge that it be read as such. We have not relied totally on that analysis, as all of us have gone beyond it in our reading. And we cannot say that each of us agrees with every sentence and word in it. Nevertheless, it seems to us a sensitive, balanced, comprehensive, accurate, and current report on the state of the research. We have relied on it extensively, and we are proud to include it here.

### 5.2.1 Sexually Violent Material

The category of material on which most of the evidence has focused is the category of material featuring actual or unmistakably simulated or unmistakably threatened violence presented in sexually explicit fashion with a predominant focus on the sexually explicit violence. Increasingly, the most prevalent forms of pornography, as well as an increasingly prevalent body of less sexually explicit material, fit this description. Some of this material involves sado-masochistic themes, with the standard accoutrements of the genre, including whips, chains, devices of torture, and so on. But another theme of some of this material is not sado-masochistic, but involves instead the recurrent theme of a man making some sort of sexual advance to a woman, being rebuffed, and then raping the woman or in some other way violently forcing himself on the woman. In almost all of this material, whether in magazine or motion picture form, the woman eventually becomes aroused and ecstatic about the initially forced sexual activity, and usually is portrayed as begging for more. There is also a large body of material, more "mainstream" in its availability, that portrays sexual activity or sexually suggestive nudity coupled with extreme violence, such as disfigurement or murder. The so-called "slasher" films fit this description, as does some material, both in films and in magazines, that is less or more sexually explicit than the prototypical "slasher" film.

It is with respect to material of this variety that the scientific findings and ultimate conclusions of the 1970 Commission are least reliable for today, precisely because material of this variety was largely absent from that Commission's inquiries. It is not, however, absent from the contemporary world, and it is hardly surprising that conclusions about this material differ from conclusions about material not including violent themes.

When clinical and experimental research has focused particularly on sexually violent material, the conclusions have been virtually unanimous. In both clinical and experimental settings, exposure to sexually violent materials has indicated an increase in the likelihood of aggression. More specifically, the research, which is described in much detail later in this Report, shows a causal relationship between exposure to material of this type and aggressive behavior towards women.

Finding a link between aggressive behavior towards women and sexual violence, whether lawful or unlawful, requires assumptions not found exclusively in the experimental evidence. We see no reason, however, not to make these assumptions. The assumption that increased aggressive behavior towards women is causally related, for an aggregate population, to increased sexual violence is significantly supported by the clinical evidence, as well as by much of the less scientific evidence.[45] They are also to all of us assumptions that are plainly justified by our own common sense. This is not to say that all people with heightened levels of aggression will commit acts of sexual violence. But it is to say that over a sufficiently large number of cases we are confident in asserting that an increase in aggressive behavior directed at women will cause an increase in the level of sexual violence directed at women.

Thus we reach our conclusions by combining the results of the research with highly justifiable assumptions about the generalizability of more limited research results. Since the clinical and experimental evidence supports the conclusion that there is a causal relationship between exposure to sexually violent materials and an increase in aggressive behavior directed towards women, and since we believe that an increase in aggressive behavior towards women will in a population increase the incidence of sexual violence in that population, we have reached the conclusion, unanimously and confidently, that the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.

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[45] For example, the evidence from formal or informal studies of self-reports of offenders themselves supports the conclusion that the causal connection we identify relates to actual sexual offenses rather than merely to aggressive behavior. For reasons we have explained in Section 5.1.5, the tendency to externalize leads us to give evidence of this variety rather little weight. But at the very least it does not point in the opposite direction from the conclusions reached here.

Although we rely for this conclusion on significant scientific empirical evidence, we feel it worthwhile to note the underlying logic of the conclusion. The evidence says simply that the images that people are exposed to bears a causal relationship to their behavior. This is hardly surprising. What would be surprising would be to find otherwise, and we have not so found. We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behavior, especially in a form that almost exclusively portrays such behavior as desirable, did not have at least some effect on patterns of behavior.

Sexual violence is not the only negative effect reported in the research to result from substantial exposure to sexually violent materials. The evidence is also strongly supportive of significant attitudinal changes on the part of those with substantial exposure to violent pornography. These attitudinal changes are numerous. Victims of rape and other forms of sexual violence are likely to be perceived by people so exposed as more responsible for the assault, as having suffered less injury, and as having been less degraded as a result of the experience. Similarly, people with a substantial exposure to violent pornography are likely to see the rapist or other sexual offender as less responsible for the act and as deserving of less stringent punishment.

These attitudinal changes have been shown experimentally to include a larger range of attitudes than those just discussed. The evidence also strongly supports the conclusion that substantial exposure to violent sexually explicit material leads to a greater acceptance of the "rape myth" in its broader sense - that women enjoy being coerced into sexual activity, that they enjoy being physically hurt in sexual context, and that as a result a man who forces himself on a woman sexually is in fact merely acceding to the "real" wishes of the woman, regardless of the extent to which she seems to be resisting. The myth is that a woman who says "no" really means "yes," and that men are justified in acting on the assumption that the "no" answer is indeed the "yes" answer. We have little trouble concluding that this attitude is both pervasive and profoundly harmful, and that any stimulus reinforcing or increasing the incidence of this attitude is for that reason alone properly designated as harmful.

Two vitally important features of the evidence supporting the above conclusions must be mentioned here. The first is that all of the harms discussed here, including acceptance of the legitimacy of sexual violence against women but not limited to it, are more pronounced when the sexually violent materials depict the woman as experiencing arousal, orgasm, or other form of enjoyment as the ultimate result of the sexual assault. This theme, unfortunately very common in the materials we have examined, is likely to be the major, albeit not the only, component of what it is in the materials in this category that causes the consequences that have been identified.

The second important clarification of all of the above is that the evidence lends some support to the conclusion that the consequences we have identified here do not vary with the extent of sexual explicitness so long as the violence is presented in an undeniably sexual context. Once a threshold is passed at which sex and violence are plainly linked, increasing the sexual explicitness of the material, or the bizarreness of the sexual activity, seems to bear little relationship to the extent of the consequences discussed here. Although it is unclear whether sexually violent material makes a substantially greater causal contribution to sexual violence itself than does material containing violence alone, it appears that increasing the amount of violence after the threshold of connecting sex with violence is more related to increase in the incidence or severity of harmful consequences than is increasing the amount of sex. As a result, the so-called "slasher" films, which depict a great deal of violence connected with an undeniably sexual theme but less sexual explicitness than materials that are truly pornographic, are likely to produce the consequences discussed here to a greater extent than most of the materials available in "adults only" pornographic outlets.

Although we have based our findings about material in this category primarily on evidence presented by professionals in the behavioral sciences, we are confident that it is supported by the less scientific evidence we have consulted, and we are each personally confident on the basis of our own knowledge and experiences that the conclusions are justified. None of us has the least doubt that sexual violence is harmful, and that general acceptance of the view that "no" means "yes" is a consequence of the most serious proportions. We have found a causal relationship between sexually explicit materials featuring violence and these consequences, and thus conclude that the class of such materials, although not necessarily every individual member of that class, is on the whole harmful to society.

### 5.2.2 Nonviolent Materials Depicting Degradation, Domination, Subordination, or Humiliation

Current research has rather consistently separated out violent pornography, the class of materials we have just discussed, from other sexually explicit materials. With respect to further subdivision the process has been less consistent. A few researchers have made further distinctions, while most have merely classed everything else as "non-violent." We have concluded that more subdivision than that is necessary. Our examination of the variety of sexually explicit materials convinces us that once again the category of "non-violent" ignores significant distinctions within this category, and thus combines classes of material that are in fact substantially different.

The subdivision we adopt is one that has surfaced in some of the research. And it is also one that might explain a significant amount of what would otherwise seem to be conflicting research results. Some researchers have found negative effects from non-violent material, while others report no such negative effects. But when the stimulus material these researchers have used is considered, there is some suggestion that the presence or absence of negative effects from non-violent material might turn on the non-violent material being considered "degrading," a term we shall explain shortly.[46] It appears that effects similar to although not as extensive as that involved with violent material can be identified with respect to such degrading material, but that these effects are likely absent when neither degradation nor violence is present.

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[46] For example, the studies of Dr. Zillmann regarding non-violent material, studies that have been particularly influential for some of us, use material that contain the following themes: "He is ready to take. She is ready to be taken. This active/passive differentiation that coincides with gender is stated on purpose." Women are portrayed as "masochistic, subservient, socially nondiscriminating nymphomaniacs." Dr. Zillmann goes on to characterize this material as involving mutual consent and no coercion, but also describes the films as ones in which "women tend to overrespond in serving the male interest."

An enormous amount of the most sexually explicit material available, as well as much of the material that is somewhat less sexually explicit, is material that we would characterize as "degrading," the term we use to encompass the undeniably linked characteristics of degradation, domination, subordination, and humiliation. The degradation we refer to is degradation of people, most often women, and here we are referring to material that, although not violent, depicts[47] people, usually women, as existing solely for the sexual satisfaction of others, usually men, or that depicts people, usually women, in decidedly subordinate roles in their sexual relations with others, or that depicts people engaged in sexual practices that would to most people be considered humiliating. Indeed, forms of degradation represent the largely predominant proportion of commercially available pornography.

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[47] We restrict our analysis in large part to degradation that is in fact depicted in the material. It may very well be that degradation led to a woman being willing to pose for a picture of a certain variety, or to engage in what appears to be a non-degrading sexual act. It may be that coercion caused the picture to exist. And it may very well be that the existing disparity in the economic status of men and women is such that any sexually explicit depiction of a woman is at least suspect on account of the possibility that the economic desparity is what caused the woman to pose for a picture that most people in this society would find embarrassing. We do not deny any of these possibilities, and we do not deny the importance of considering as pervasively as possible the status of women in contemporary America, including the effects of their current status and what might be done to change some of the detrimental consequences of that status. But without engaging in an inquiry of that breadth, we must generally, absent more specific evidence to the contrary, assume that a picture represents what it depicts.

With respect to material of this variety, our conclusions are substantially similar to those with respect to violent material, although we make them with somewhat less confidence and our making of them requires more in the way of assumption than was the case with respect to violent material. The evidence, scientific and otherwise, is more tentative, but supports the conclusion that the material we describe as degrading bears some causal relationship to the attitudinal changes we have previously identified. That is, substantial exposure to material of this variety is likely to increase the extent to which those exposed will view rape or other forms of sexual violence as less serious than they otherwise would have, will view the victims of rape and other forms of sexual violence as significantly more responsible, and will view the offenders as significantly less responsible. We also conclude that the evidence supports the conclusion that substantial exposure to material of this type will increase acceptance of the proposition that women like to be forced into sexual practices, and, once again, that the woman who says "no" really means "yes."

With respect to material of this type, there is less evidence causally linking the material with sexual aggression, but this may be because this is a category that has been isolated in only a few studies, albeit an increasing number. The absence of evidence should by no means be taken to deny the existence of the causal link. But because the causal link is less the subject of experimental studies, we have been required to think more carefully here about the assumptions necessary to causally connect increased acceptance of rape myths and other attitudinal changes with increased sexual aggression and sexual violence. And on the basis of all the evidence we have considered, from all sources, and on the basis of our own insights and experiences, we believe we are justified in drawing the following conclusion: Over a large enough sample a population that believes that many women like to be raped, that believes that sexual violence or sexual coercion is often desired or appropriate, and that believes that sex offenders are less responsible for their acts, will commit more acts of sexual violence or sexual coercion than would a population holding these beliefs to a lesser extent.

We should make clear what we have concluded here. We are not saying that everyone exposed to material of this type has his attitude about sexual violence changed. We are saying only that the evidence supports the conclusion that substantial exposure to degrading material increases the likelihood for an individual and the incidence over a large population that these attitudinal changes will occur. And we are not saying that everyone with these attitudes will commit an act of sexual violence or sexual coercion. We are saying that such attitudes will increase the likelihood for an individual and the incidence for a population that acts of sexual violence, sexual coercion, or unwanted sexual aggression will occur. Thus, we conclude that substantial exposure to materials of this type bears some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed.

We need mention as well that our focus on these more violent or more coercive forms of actual subordination of women should not diminish what we take to be a necessarily incorporated conclusion: Substantial exposure to materials of this type bears some causal relationship to the incidence of various non-violent forms of discrimination against or subordination of women in our society. To the extent that these materials create or reinforce the view that women's function is disproportionately to satisfy the sexual needs of men, then the materials will have pervasive effects on the treatment of women in society far beyond the incidence of identifiable acts of rape or other sexual violence. We obviously cannot here explore fully all of the forms in which women are discriminated against in contemporary society. Nor can we explore all of the causes of that discrimination against women. But we feel confident in concluding that the view of women as available for sexual domination is one cause of that discrimination, and we feel confident as well in concluding that degrading material bears a causal relationship to the view that women ought to subordinate their own desires and beings to the sexual satisfaction of men.

Although the category of the degrading is one that has only recently been isolated in some research, in the literature generally, and in public discussion of the issue, it is not a small category. If anything, it constitutes somewhere between the predominant and the overwhelming portion of what is currently standard fare heterosexual pornography, and is a significant theme in a broader range of materials not commonly taken to be sexually explicit enough to be pornographic. But as with sexually violent materials, the extent of the effect of these degrading materials may not turn substantially on the amount of sexual explicitness once a threshold of undeniable sexual content is surpassed. The category therefore includes a great deal of what would now be considered to be pornographic, and includes a great deal of what would now be held to be legally obscene, but it includes much more than that. Since we are here identifying harms for a class, rather than identifying harms caused by every member of that class, and since we are here talking about the identification of harm rather than making recommendations for legal control, we are not reluctant to identify harms for a class of material considerably wider than what is or even should be regulated by law.

### 5.2.3 Non-Violent and Non-Degrading Materials

Our most controversial category has been the category of sexually explicit materials that are not violent and are not degrading as we have used that term. They are materials in which the participants appear to be fully willing participants occupying substantially equal roles in a setting devoid of actual or apparent violence or pain. This category is in fact quite small in terms of currently available materials. There is some, to be sure, and the amount may increase as the division between the degrading and the non-degrading becomes more accepted, but we are convinced that only a small amount of currently available highly sexually explicit material is neither violent nor degrading. We thus talk about a small category, but one that should not be ignored.

We have disagreed substantially about the effects of such materials, and that should come as no surprise. We are dealing in this category with "pure" sex, as to which there are widely divergent views in this society. That we have disagreed among ourselves does little more than reflect the extent to which we are representative of the population as a whole. In light of that disagreement, it is perhaps more appropriate to explain the various views rather than indicate a unanimity that does not exist, within this Commission or within society, or attempt the preposterous task of saying that some fundamental view about the role of sexuality and portrayals of sexuality was accepted or defeated by such-and-such vote. We do not wish to give easy answers to hard questions, and thus feel better with describing the diversity of opinion rather than suppressing part of it.

In examining the material in this category, we have not had the benefit of extensive evidence. Research has only recently begun to distinguish the non-violent but degrading from material that is neither violent nor degrading, and we have all relied on a combination of interpretation of existing studies that may not have drawn the same divisions, studies that did draw these distinctions, clinical evidence, interpretation of victim testimony, and our own perceptions of the effect of images on human behavior. Although the social science evidence is far from conclusive, we are on the current state of the evidence persuaded that material of this type does not bear a causal relationship to rape and other acts of sexual violence. We rely once again not only on scientific studies outlined later in the Report, and examined by each of us, but on the fact that the conclusions of these studies seem to most of us fully consistent with common sense. Just as materials depicting sexual violence seem intuitively likely to bear a causal relationship to sexual violence, materials containing no depictions or suggestions of sexual violence or sexual dominance seem to most of us intuitively unlikely to bear a causal relationship to sexual violence. The studies and clinical evidence to date are less persuasive on this lack of negative effect than they are persuasive for the presence of negative effect for the sexually violent material, but they seem to us of equal persuasive power as the studies and clinical evidence showing negative effects for the degrading materials. The fairest conclusion from the social science evidence is that there is no persuasive evidence to date supporting the connection between non-violent and non-degrading materials and acts of sexual violence, and that there is some, but very limited evidence, indicating that the connection does not exist. The totality of the social science evidence, therefore, is slightly against the hypothesis that non-violent and non-degrading materials bear a causal relationship to acts of sexual violence.

That there does not appear from the social science evidence to be a causal link with sexual violence, however, does not answer the question of whether such materials might not themselves simply for some other reason constitute a harm in themselves, or bear a causal link to consequences other than sexual violence but still taken to be harmful. And it is here that we and society at large have the greatest differences of opinion.

One issue relates to materials that, although undoubtedly consensual and equal, depict sexual practices frequently condemned in this and other societies. In addition, level of societal condemnation varies for different activities; some activities are condemned by some people, but not by others. We have discovered that to some significant extent the assessment of the harmfulness of materials depicting such activities correlates directly with the assessment of the harmfulness of the activities themselves. Intuitively and not experimentally, we can hypothesize that materials portraying such an activity will either help to legitimize or will bear some causal relationship to that activity itself. With respect to these materials, therefore, it appears that a conclusion about the harmfulness of these materials turns on a conclusion about the harmfulness of the activity itself. As to this, we are unable to agree with respect to many of these activities. Our differences reflect differences now extant in society at large, and actively debated, and we can hardly resolve them here.

A larger issue is the very question of promiscuity. Even to the extent that the behavior depicted is not inherently condemned by some or any of us, the manner of presentation almost necessarily suggests that the activities are taking place outside of the context of marriage, love, commitment, or even affection. Again, it is far from implausible to hypothesize that materials depicting sexual activity without marriage, love, commitment, or affection bear some causal relationship to sexual activity without marriage, love, commitment, or affection. There are undoubtedly many causes for what used to be called the "sexual revolution," but it is absurd to suppose that depictions or descriptions of uncommitted sexuality were not among them.48 Thus, once again our disagreements reflect disagreements in society at large, although not to as great an extent. Although there are many members of this society who can and have made affirmative cases for uncommitted sexuality, none of us believes it to be a good thing. A number of us, however, believe that the level of commitment in sexuality is a matter of choice among those who voluntarily engage in the activity. Others of us believe that uncommitted sexual activity is wrong for the individuals involved and harmful to society to the extent of its prevalence. Our view of the ultimate harmfulness of much of this

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[48] Nor, of course, do we deny the extent that the phenomenon, in part, also goes the other way. Sexually explicit materials in most cases seem both to reflect and to cause demand.

material, therefore, is reflective of our individual views about the extent to whether sexual commitment is purely a matter of individual choice.

Even insofar as sexually explicit material of the variety being discussed here is not perceived as harmful for the messages it carries or the symbols it represents, the very publicness of what is commonly taken to be private is cause for concern.[49] Even if we hypothesize a sexually explicit notion picture of a loving married couple engaged in mutually pleasurable and procreative vaginal intercourse, the depiction of that act on a screen or in a magazine may constitute a harm in its own right (a "primary harm" in the terminology introduced earlier in this Chapter) solely by virtue of being shown. Here the concern is with the preservation of sex as an essentially private act, in conformity with the basic privateness of sex long recognized by this and all other societies. The alleged harm here, therefore, is that as soon as sex is put on a screen or put in a magazine it changes its character, regardless of what variety of sex is portrayed. And to the extent that the character of sex as public rather than private is the consequence here, then that to many would constitute a harm.

In considering the way in which making sex public may fundamentally transform the character of sex in all settings, it seems important to emphasize that the act of making sex public is as an empirical matter almost always coincident with the act of making sex a commercial enterprise. Whether the act of making sex public if done by a charitable institution would be harmful is an interesting academic exercise, but it is little more than that. For in the context we are discussing, taking the act of sex out of a private setting and making it public is invariably done for someone's commercial gain. To many of us, this fact of commercialization is vital to understanding the concern about sex and privacy.

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[49] The concerns summarized here are articulated more fully in a statement that expresses the views of a number of individual members of this Commission.

We are again, along with the rest of society, unable to agree as to the extent to which making sex public and commercial should constitute a harm. We all agree for ourselves on the fundamental privateness of sex, but we disagree about the extent to which the privateness of sex is more than a matter of individual choice. And although we all to some extent think that sexuality may have in today's society become a bit too public, many of us are concerned that in the past it has been somewhat too private, being a subject that could not be talked about, could not constitute part of the discourse of society, and was treated in some way as "dirty." To the extent that making sex more public has, while not without costs, alleviated some of these problems of the past, some of us would not take the increased publicness of sexuality as necessarily harmful, but here again we are quite understandably unable to agree.

The discussion of publicness in the previous paragraph was limited to the necessary publicness consequent in making a picture of a sexual act, regardless of whether the picture is made public in the broader sense. But to the extent that this occurs, we are once again in agreement. While some might argue that it is desirable for sexual explicitness to be publicly displayed to both willing and unwilling viewers, and while some might argue that this is either a positive advantage for the terrain of society or of no effect, we unanimously reject that conclusion. We all agree that some large part of the privateness of sex is essential, and we would, for example, unanimously take to be harmful to society a proliferation of billboards displaying even the hypothesized highly explicit photograph of a loving married couple engaged in mutually pleasurable and procreative vaginal intercourse. Thus, to the extent that materials in this category are displayed truly publicly, we unanimously would take such a consequence to be harmful to society in addition to being harmful to individuals. Even if unwilling viewers are offended rather than harmed in any stronger sense, we take the large scale offending of the legitimate sensibilities of a large portion of the population to be harmful to society.

A number of witnesses have testified about the effects on their own sexual relations, usually with their spouses, of the depiction on the screen and in magazines of sexual practices in which they had not previously engaged. A number of these witnesses, all women, have testified that men in their lives have used such material to strongly encourage, or coerce, them int engaging in sexual practices in which they do not choose to engage. To the extent that such implicit or explicit coercion takes place as a result of these materials, we all agree that it is a harm. There has been other evidence, however, about the extent to which such material might for some be a way of revitalizing their sex lives, or, more commonly, simply constituting a part of a mutually pleasurable sexual experience for both partners. On this we could not agree. For reasons relating largely to the question of publicness in the first sense discussed above, some saw this kind of use as primarily harmful. Others saw it as harmless and possibly beneficial in contexts such as this. Some professional testimony supported this latter view, but we have little doubt that professional opinion is also divided on the issue.

Perhaps the most significant potential harm in this category exists with respect to children. We all agree that at least much, probably most, and maybe even all material in this category, regardless of whether it is harmful when used by adults only, is harmful when it falls into the hands of children. Exposure to sexuality is commonly taken, and properly so, to be primarily the responsibility of the family. Even those who would disagree with this statement would still prefer to have early exposure to sexuality be in the hands of a responsible professional in a controlled and guided setting. We have no hesitancy in concluding that learning about sexuality from most of the material in this category is not the best way for children to learn about the subject. There are harms both to the children themselves and to notions of family control over a child's introduction to sexuality if children learn about sex from the kinds of sexually explicit materials that constitute the bulk of this category of materials.

We have little doubt that much of this material does find its way into the hands of children, and to the extent that it does we all agree that it is harmful. We may disagree about the extent to which people should, as adults, be tolerated in engaging in sexual practices that differ from the norm, but we all agree about the question of the desirability of exposing children to most of this material, and on that our unanimous agreement is that it is undesirable. For children to be taught by these materials that sex is public, that sex is commercial, and that sex can be divorced from any degree of affection, love, commitment, or marriage is for us the wrong message at the wrong time. We may disagree among ourselves about the extent to which the effect on children should justify large scale restrictions for that reason alone, but again we all agree that if the question is simply harm, and not the question of regulation by law, that material in this category is, with few exceptions, generally harmful to the extent it finds its way into the hands of children. Even those in society who would be least restrictive of sexually explicit materials tend, by and large, to limit their views to adults. The near unanimity in society about the effects on children and on all of society in exposing children to explicit sexuality in the form of even non-violent and non-degrading pornographic materials makes a strong statement about the potential harms of this material, and we confidently agree with that longstanding societal judgment.

Perhaps the largest question, and for that reason the question we can hardly touch here, is the question of harm as it relates to the moral environment of a society. There is no doubt that numerous laws, taboos, and other social practices all serve to enforce some forms of shared moral assessment. The extent to which this enforcement should be enlarged, the extent to which sexual morality is a necessary component of a society's moral environment, and the appropriate balance between recognition of individual choice and the necessity of maintaining some sense of community in a society are questions that have been debated for generations. The debates in the nineteenth century between John Stuart Mill and James FitzJames Stephen, and in the twentieth century between Patrick Devlin and H.L.A. Hart, are merely among the more prominent examples of profound differences in opinion that can scarcely be the subject of a vote by this Commission. We all agree that some degree of individual choice is necessary in any free society, and we all agree that a society with no shared values, including moral values, is no society at all. We have numerous different views about the way in which these undeniably competing values should best be accommodated in this society at this time, or in any society at any time. We also have numerous different views about the extent to which, if at all, sexual morality is an essential part of the social glue of this or any other society. We have talked about these issues but we have not even attempted to resolve our differences because these differences are reflective of differences that ar both fundamental and widespread in all societies. That we hav been able to talk about them has been important to us, and ther is no doubt that our views on these issues bear heavily on th views we hold about many of the more specific issues that hav been within the scope of our mission.

Thus, with respect to the materials in this category, ther are areas of agreement and areas of disagreement. We unanimousl agree that the material in this category in some settings ar when used for some purposes can be harmful. None of us thin that the material in this category, individually or as a clas is in every instance harmless. And to the extent that some the materials in this category are largely educational undeniably artistic, we unanimously agree that they are litt cause for concern if not made available to children are foist on unwilling viewers. But most of the materials in this catego would not now be taken to be explicitly educational or artisti and as to this balance of materials our disagreements a substantial. Some of us think that some of the material at so times will be harmful, that some of the material at some tim will be harmless, and that some of the material at times will beneficial, especially when used for professional nonprofessional therapeutic purposes. And some of us, whi recognizing the occasional possibility of a harmless beneficial use, nevertheless, for reasons stated in this section, feel that on balance it is appropriate to identify the class as harmful as a whole, if not in every instance. We have recorded this disagreement, and stated the various concerns. We can do little more except hope that the issues will continue to be discussed. But as it is discussed, we hope it will be recognized that the class of materials that are neither violent nor degrading is at it stands a small class, and many of these disagreements are more theoretical than real. Still, this class is not empty, and may at some point increase in size, and thus the theoretical disagreements may yet become germane to a larger class of materials actually available.

### 5.2.4 Nudity

We pause only briefly to mention the problem of mere nudity. None of us think that the human body or its portrayal is harmful. But we all agree that this statement is somewhat of an oversimplification. There may be instances in which portrayals of nudity in an undeniably sexual context, even if there is no suggestion of sexual activity, will generate many of the same issues discussed in the previous section. There are legitimate questions about when and how children should be exposed to nudity, legitimate questions about public portrayals of nudity, and legitimate questions about when "mere" nudity stops being "mere" nudity and has such clear connotations of sexual activity that it ought at least to be analyzed according to the same factors that we discuss with respect to sexually explicit materials containing neither violence nor degradation.

In this respect nudity without force, coercion, sexual activity, violence, or degradation, but with a definite provocative element, represents a wide category of materials. At the least explicit end of the spectrum, we could envision aesthetically posed, air brushed photographs of beautiful men or women in a provocative context. The provocation derives from the power of sex to attract the attentions and stir the passions of all of us. Such materials may have, in most uses, little negative effect on individuals, families, or society. But at the other end of the continuum, we see materials specifically designed to maximize the sexual impact by the nature of the pose, the caption, the seductive appearance, and the setting in which the model is placed. For example, consider a woman shown in a reclining position with genitals displayed, wearing only red feathers and high heeled shoes, holding a gun and accompanied by a caption offering a direct invitation to sexual activity. With respect to such more explicit materials, we were unable to reach complete agreement. We are all concerned about the impact of such material on children, on attitudes towards women, on the relationship between the sexes, and on attitudes towards sex in general, but the extent of the harms was the subject of some difference of opinion.

None of us, of course, finds harmful the use of nudity in art and for plainly educational purposes. Similarly, we all believe that in some circumstances the portrayal of nudity may be undesirable. It is therefore impossible to draw universal conclusions about all depictions of nudity under all conditions. But by and large we do not find the nudity that does not fit within any of the previous categories to be much cause for concern.

### 5.3 The Need for Further Research

Although we have mentioned it throughout this report, it is appropriate here to emphasize specially the importance of further research by professionals into the potential and actual harms we have discussed in this Chapter. We are confident that the quality and quantity of research far surpasses that available in 1970, but we also believe that the research remains in many respects unsystematic and unfocused. There is still a great deal to be done. In many respects research is still at a fairly rudimentary stage, with few attempts to standardize categories of analysis, self-reporting questionnaires, types of stimulus materials, description of stimulus materials, measurement of effects, and related problems.

We recognize that the ethical problems discussed above will inevitably place some cap on the conclusions that can be drawn from the research in this area. But apart from this inherent and incurable limitation, much can still be done. The research that has led to further subdivision of the large category of sexually explicit materials has perhaps been the most important development in recent years, and we strongly encourage research that will deal more precisely with different varieties of materials. We also believe that many other specific questions are in need of further research. There needs to be more research, for example, about the effect of pornography on the marriage relationship, about the nature of appetites for pornographic material and how those appetites are developed, about the effect of depictions of particular sexual practices on the sexual preferences of those who view them, and about the effects of exposure to pornographic material on children. This list could be much longer, but the point is only to show that much more needs to be done.

Some of the professionals who have provided evidence to us have been quite outspoken in their views about what the government in general or the legal system in particular ought to do about pornography. This phenomenon has been about equally divided between those researchers who have advocated fewer legal controls and those who have advocated more. While we do not deny to citizens the right to speak out on matters of public concern, we ought to note that we have tended to rely most on evidence provided by those who seem less committed to a particular point of view beyond their scientific expertise. We deal in an area in which a great deal must be taken on faith, including description of stimulus materials, description of experimental environments, questionnaire design, and description of what may or may not have been told to subjects. At no time have we suspected any scientist of deliberately or even negligently designing an experiment or reporting its results, but it remains nevertheless the case that there is room for judgment and room for discretion. Where a researcher has taken on the role as active crusader, one way or another, on the issue of governmental control of pornography, we are forced to question more than we would otherwise have done the way in which this judgment and discretion has been exercised. We will not suggest how any researcher should balance the issue of his or her own credibility against his or her own strong feelings about an issue of importance. But we will note that the more that is expected to be taken on trust, the more likely it is that active involvement with respect to what is to be done with the results of the research will decrease the amount of trust.

# Chapter 6

# Laws And Their Enforcement

## 6.1 An Overview of the Problem

In Chapter 5 of this Part we explored the various harms alleged to be caused by certain kinds of sexually explicit materials. We also indicated our conclusions with respect to questions of harm. But as we insisted throughout Chapter 5 of this Part, the fact that a certain kind of material causes a certain kind of harm, although generally a factor in making decisions about law and law enforcement, does not by itself entail the conclusion that the material causing the harm should be controlled by the law. In some cases private action may be more appropriate than governmental action. In some cases governmental action, even if ideally appropriate, may be inadvisable as a matter of policy or unworkable as a matter of practice. And in some cases governmental action may be unconstitutional. Still, the prevention and redress of harms to individuals and harms to society have long been among the central functions of government in general and law in particular. Although we are sensitive to the space between what is harmful and what harms the government ought to address, at least we start with the assumption that where there is an identified harm, then governmental action ought seriously to be considered. In some cases the result of that consideration will be the conclusion that governmental action is inappropriate, unworkable, or unconstitutional. But so long as we have identified harms, we must consider carefully the possible legal remedies for each harm we have identified.

We have tried to consider as broadly as possible the kinds of legal remedies that might be appropriate to deal with various harms. Although enforcement of the criminal law has long been considered the primary legal tool for dealing with harmful sexually explicit material, it has not been the only such tool, and ought not to be considered the only possible one. We have tried to be as open as we could be to various options in addition to or instead of enforcement of the criminal law. Thus in this Chapter we will consider the appropriateness, as exclusive or supplemental remedies, of zoning, administrative regulation, civil remedies for damages in the form of a civil rights action, civil remedies to obtain an injunction, and other possible legal responses to the harms that have been identified. We do not claim to be exhaustive in our consideration of regulatory options. Some options that have been suggested to us simply do not warrant discussion. And others that we mention briefly could and should be explored more thoroughly by others. But it is important to us to emphasize that approaches other than the traditional criminal law sanctions do exist, and are an integral part of thinking carefully about the issue of pornography.

## 6.2 Should Pornography Be Regulated By Law?

### 6.2.1 The Question is Deregulation

Numerous witnesses at our public hearings, as well as many others in written evidence or in various publications, have urged upon us the view that pornography should not be regulated by law. Because such arguments have been around for some time, and because such arguments were substantially accepted by the 1970 Commission, we have very seriously considered them. To a significant extent, however, the arguments remain unpersuasive.

Many of the arguments against regulation, both those made currently and those made earlier, rest on claims of harmlessness that, as we have explained in Chapter 5 of this Part, are simply erroneous with respect to much of this material. Some of these claims of harmlessness tend either to ignore much of the evidence, or to extrapolate from plausible conclusions about the most innocuous material to conclusions about an entire class. Others start with the assumption that no finding of harm can be accepted unless it meets some extraordinarily high burden of proof, a burden of proof whose rigor often seems premised on an *a priori* assertion that the material being discussed ought not to be regulated.

In addition to erroneous or skewed claims of harmlessness, many of the arguments against regulation depend on claims of unconstitutionality that would require for their acceptance a view of the law strikingly different from that long accepted by the Supreme Court in its rulings on obscenity. As we discuss in Chapter 3 of this Part, we accept the Supreme Court's basic approach to the constitutional question. To the extent that claims for non-regulation thus rest on constitutional arguments with which neither we nor the Supreme Court accept, we reject those arguments for non-regulation.

To the extent that arguments for non-regulation do no depend on implausible claims of harmlessness or rejected claim of unconstitutionality, however, they deserve to be taken eve more seriously. As questions of policy in particular areas o the appropriateness of governmental action in general, serio arguments have been made that go to the most fundament questions of what governmental action is designed to achieve.

We have thought carefully about these issues explicitl and in doing so we have found it necessary to recast t question. The question as often presented to us in effect a whether, if we had no laws dealing with pornography, we wo want them. This question is not the same as the quest whether, given 180 years of pornography regulation in the Uni States, we should repeal it. Although virtually every argum for deregulation presented to us has been in the former tone, is the latter that represents reality. We certainly do not everything that is to be inevitable, and we deem it importan treat even that which has been assumed for generations as for serious and foundational reconsideration. Nevertheless remains the case that there are vast real and symb differences between not doing what has not before been don undoing what is currently in place. To undo makes a stat much stronger than that made by not doing. In many cases i be fully appropriate to make this stronger statement, b presuppose here that the evidence and our convictions mu stronger to urge dismantling what is now in place than it would have to be to refuse to put in place what did not now exist. Moreover, we recognize that this is an area marked by serious debate, involving plausible arguments both for and against regulation. Where the issues are not all on one side, we have given some weight to the considered judgment of the past. In some sense, therefore, the burden of proof is on those who would urge adoption of a variety of governmental regulation that does not now exist. In a nation founded on principles of limited government, those who would make it less limited have the obligation to persuade. But where there exists a present practice and long history of regulation of a certain variety, the burden is on those who would have government make the necessarily much stronger statement implied by an affirmative act of deregulation.

In light of this, we take the question of the governmental regulation of the legally obscene not to be whether if we did not have obscenity laws would we want them, but whether given that we have obscenity laws do we want to abandon them. In many areas the issues before us are not close, and how the question is put does not determine the outcome. But in many other areas the questions are indeed difficult, and how the questions are cast, and where the burden of proof lies, do make a difference. With reference to criminal sanctions against the legally obscene, for example, the burden must be on those who would have us or society make the specially strong statement implicit in the act of

repeal. But with reference to certain forms of regulation tha
do not now exist, the burden is similarly on those who would hav
us or society make the specially strong statement implicit in
urging the totally new.

### 6.2.2 Law Enforcement, Priority, and Multiple Causati

As we have discussed in Chapter 5 in this Part, most of th
harms that we have identified are not caused exclusively or eve
predominantly by pornography. In Chapter 5 in this Part
discussed this problem of multiple causation in terms
relatively abstract questions of harm. But when the phenomen
of multiple causation is applied to actual problems of laws a
their enforcement, the issue gets more difficult. Even if it
the case that a certain form of sexually explicit material bea
a causal relationship to harm, the question remains whether so
other stimulus has an even greater causal relationship. Exce
peripherally, we could not be expected to delve deeply into a
possible other causes of sexual violence, sex discrimination, a
excess sexual aggression. To the extent that we ma
recommendations about law enforcement, we make them from
presupposition that others from a larger perspective must ma
the ultimate determinations about allocation of scarce financi
and other societal resources. This task includes not only t
allocation of resources among various causes of the harms we ha
identified, but also involves the even more difficult question
allocating resources among these harms and others. These a
difficult questions, and we do not claim that either simp

formulas or easy platitudes can answer questions about, for example, apportioning money among countermeasures against poverty, racism, terrorism, and sexual violence. None of us would say that any of these is unimportant, but we recognize that in a world of scarce resources the long term commitment of resources to combat one evil inevitably draws resources away from those available to combat another evil. Even if one assumes that there are currently underutilized resources that could be allocated to the harms we discuss here, such an allocation still involves a decision to allocate the currently underutilized resources to combat these harms rather than some others. We have no solutions to these intractable problems of priority in a world in which there is more to do than there are resources with which to do it. Nevertheless, we feel it important to note here that we have not ignored these problems, and we urge that everything we say be considered in light of these considerations.

Although we are sensitive to the difficulty of problems of priority, we still feel confident in concluding that, at the very least, the problems of sexual violence, sexual aggression short of actual violence, and sex discrimination are serious societal problems that have traditionally received a disproportionately small allocation of societal resources. To the extent that we would be asked the question whether resources should be expended on alleviating these problems rather than dealing with others, we assert strongly that these problems have received less resources than we think desirable, and that remedying that imbalance by a possibly disproportionate allocation in the opposite direction is appropriate.

The conclusion in the previous paragraph does not address the question of priorities of approach once we have decided to treat these problems as high priority matters. With respect to priorities in dealing with the problems of sexual violence, sexual aggression not involving violence, and sex discrimination, people disagree about the optimal priority that dealing in some way with sexually violent pornography and sexually degrading pornography ought to have. But images are significant determinants of attitudes, and attitudes are significant determinants of human behavior. To the extent constitutionally permissible, dealing with the messages all around us seems an important way of dealing with the behavior. We have concluded that the images we deal with here seem to be at the least a substantial cause of the harms we have identified. But common sense leads us to go further, and to suppose that the images are a significant cause even when compared with all of the other likely causes of these same harms. To the extent that this substantial causal relationship has not been reflected in the realities of law enforcement, we have little hesitation in making recommendations about increased priority.

### 6.2.3 The Problem of Underinclusiveness

The problem of multiple causation is addressed to those causes of certain harms other than some varieties of pornographic materials. The problem has another aspect, best referred to as the problem of underinclusiveness. For even if we restrict our consideration to sexually oriented images, to the various kinds of sexually explicit materials discussed in Chapter 5 of this Part, it is certainly the case that many of those materials are constitutionally immune from governmental regulation. And to the extent that the material involved becomes less explicit, the immunity from regulation, as a matter of current law, increases. A great deal of sexual violence, for example, is part of less sexually explicit and generally available films and magazines, and because it is presented in less explicit fashion in the context of some plot or theme it remains beyond the realm of governmental control, although non-governmental self-restraint or citizen action seems highly appropriate. And when we include various other sources of sexually oriented messages and images in contemporary society, from prime time television to the lyrics of contemporary music to advertisements for blue jeans, it is even more apparent that much of what people are concerned with in terms of truly pornographic materials might also be a concern with respect to an immense range and quantity of materials that are unquestionably protected by the First Amendment. Many of these materials may present the message in a more diluted form, but certainly their prevalence more than compensates for any possible dilution. As a result, even the most stringent legal strategies within current or even in any way plausible constitutional limitations would likely address little more than the tip of the iceberg.

We thus confront a society in which the Constitution properly requires governments to err on the side of underregulation rather than overregulation, and in which the First Amendment leaves most of the rejection of unacceptable and dangerous ideas to citizens rather than to government. Faced with this reality, it would be easy to note the irremediable futility of being limited only to a thin slice of the full problem, and as a consequence recommend deregulation even as to the material we deem harmful and constitutionally unprotected. But this would be too easy. First, it ignores the extent to which the materials that can be regulated consistent with the Constitution may, because they present their messages in a form undiluted by any appeal to the intellect, bear a causal relationship to the harms we have identified to a disproportionate degree. And with respect to sexual violence, these materials may disproportionately be aimed at and influence people more predisposed to this form of behavior. For both of these reasons, most of us believe that in many cases the harm-causing capacities of some sexually explicit material may be more concentrated in that which is constitutionally regulable and legally obscene than in that which is plainly protected by the Constitution. This factor of concentration of harm may itself justify maintaining a strategy of law enforcement in the face of massive underinclusiveness.

More significantly, however, law serves an important symbolic function, and in many areas of life that which the law condemns serves as a model for the condemnatory attitudes and actions of private citizens. Obviously this symbolic function, the way in which the law teaches as well as controls, is premised on a general assumption of legitimacy with respect to the law in general that generates to many people a presumption that the law's judgments are morally, politically, and scientifically correct in addition to being merely authoritative. In making recommendations about what the law should do, we are cognizant of the responsibilities that accompany law's symbolic function. We are aware as well of its opportunities, and of the symbolic function that may be served by even strikingly underinclusive regulation. Conversely, we are aware of the message conveyed by repeal or non-enforcement of existing laws with respect to certain kinds of materials. To the extent that we believe, as we do, that in a number of cases the message that is or would be conveyed by repeal or non-enforcement is exactly the opposite message from what we have concluded and what the evidence supports, we are unwilling to have the law send out the wrong signal. Especially on an issue as publicly noted and debated as this, the law will inevitably send out a signal. We would prefer that it be the signal consistent with the evidence and consistent with our conclusions.

### 6.3 The Criminal Law

In light of our conclusions regarding harm, and in light of the factors discussed above in Section 6.2, we reject the argument that all distribution of legally obscene pornography should be decriminalized. Even with that conclusion, however, many issues remain, and it is to these that we now turn.

### 6.3.1 The Sufficiency of Existing Criminal Laws

The laws of the United States and of almost every state make criminal the sale, distribution, or exhibition of material defined as obscene pursuant to the definition set forth by the Supreme Court in Miller v. California.[50] The enormous differences among states and among other geographic areas in obscenity law enforcement are due not to differences in the laws as written,[51] but to differences in how, how vigorously, and how often these laws are enforced.

Some witnesses have urged us to recommend changes in the criminal law resulting in laws that are significantly different in scope or in method of operation from those now in force. We have, for example, been urged to recommend a "per se" approach to obscenity law that would make the display of certain activities automatically obscene and we have been urged to recommend a definition of the legally obscene that is broader than that of Miller. We have thought carefully about these and similar suggestions, but we have rejected them. We have rejected these suggestions for a number of reasons, the most important of which is that it has not been shown that the basic definitions or broad methods of operation of existing laws are in any way insufficient legal tools for those who care to use them. Some witnesses have complained about the uncertainty of the existing legal definition of obscenity, but it has appeared to us that these uncertainty claims have usually been the scapegoat for relatively low prosecutorial initiatives. A substantially larger number of witnesses involved in law enforcement have testified that they do not find excess uncertainty in the Miller standard as applied and interpreted, and consequently believe that the existing laws are sufficient for their needs. The success of prosecutorial efforts in Atlanta, Cincinnati, and several other localities, in which vigorous investigation, vigorous prosecution, and stringent sentencing have substantially diminished the availability of almost all legally obscene materials, plainly indicates that the laws are there for those areas that choose the course of vigorous enforcement. We recognize that not all localities will wish to make the commitments of resources that Atlanta and Cincinnati have, but the experiences in such localities persuades us that the desire to have new or more laws, while always appealing as political strategy, is in fact unjustified on the record.

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[50] 413 U.S. 15 (1973). We discuss Miller and other applicable cases in detail in Chapter 3 of this Part.

[51] There are exceptions to this, however. For example, California has until recently employed as a definition of obscenity not the test in Miller, but the "utterly without redeeming social value" test from Memoirs v. Massachusetts, 383 U.S. 413 (1966).

Moreover, a new law incorporating a definition of its coverage different from that in Miller would be sure to be challenged in the courts on constitutional grounds. At the moment, the conclusion must be that these proposals are constitutionally dubious in light of Miller, that they would remain so until there was a Supreme Court decision validating them and in effect overruling Miller, and that there is no indication at the present time that the Supreme Court is inclined in this direction. Even assuming a desire to restrict materials not currently subject to restriction under Miller, a desire that most of us do not share, we find a strategy of embarking on years of constitutional litigation with little likelihood of success to be highly counterproductive unless the current state of the law is distinctly unsatisfactory in light of the desire to pursue legitimate goals. Because we do not find the existing state of the law unsatisfactory to pursue the goals we have urged, we reject the view that laws incorporating a different and constitutionally suspect definition of coverage are needed or are in any way desirable.

### 6.3.2 The Problems of Law Enforcement

If the laws on the books are sufficient, then what explains the lack of effective enforcement of obscenity laws throughout most parts of the country? The evidence is unquestionable that with few exceptions the obscenity laws that are on the books go unenforced. As of the dates when the testimony was presented to us, cities as large as Miami, Florida, and Buffalo, New York, had but one police officer assigned to enforcement of the obscenity laws. Chicago, Illinois, had two. Los Angeles, California, had fewer than ten. The City of New York will not take action against establishments violating the New York obscenity laws unless there is a specific complaint, and even then prosecution is virtually non-existent. Federal law enforcement is limited almost exclusively to child pornography and to a few major operations against large pornography production and distribution networks linked to organized crime. From January 1, 1978, to February 27, 1986, a total of only one hundred individuals were indicted for violation of the federal obscenity laws, and of the one hundred indicted seventy-one were convicted.[52]

From this and much more evidence just like it, the conclusion is unmistakable that with respect to the criminal laws relating to obscenity, there is a striking underenforcement, and that this underenforcement consists of undercomplaining, underinvestigation, underprosecution, and undersentencing. The reasons for this are complex, and we regret that we have not been able to explore nearly as much as we would have liked the reasons for this complex phenomenon. We offer here only a few hypotheses, and hope that further research by criminologists and others will continue where we leave off.

With respect to sentencing, the evidence was almost unanimous that small fines and unsupervised probation are the norm, with large fines or sentences of incarceration quite rare throughout the country. In examining this phenomenon, we can speculate on a number of problems. When the prosecution involves as defendants those with significant control over the enterprise, the defendant is likely to appear as very much like the typical

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[52] Of the remaining twenty-nine cases, only three resulted in acquittals.

"white collar" criminal nicely dressed, well-spoken, and a residence in the suburbs. A person fitting this description is least likely in contemporary America to receive jail time, regardless of the crime. In this respect we suspect that the problem of undersentencing is traceable to the same causes that have produced the same phenomenon with regard to other crimes. People who have control over the sale of illegally obscene materials do not go to jail for many of the same reasons that price fixers, odometer adjusters, and securities manipulators do not go to jail, and if they do it is still less often and for less time than do people committing other crimes that allow equivalent statutory sentences. Moreover, like these and other crimes, obscenity offenses often appear to both judges and probation officers as less serious than violent crimes, and often as even less serious than various crimes against property. To a significant extent, those involved in the sentencing process tend not to perceive obscenity violations as serious crimes. Whether these judgments of seriousness made by judges and probation officers are or are not correct is of course debatable, but the point remains that there seems to be a substantial interposition of judgment of seriousness between the legislative determination and the actual sentence. As a result, sentencing usually involves only a fine and unsupervised probation, and is often treated by the defendant as little more than a cost of doing business.[53]

With respect to those without ownership or managerial control, usually ticket takers or clerks, many judges and probation officers seem understandably reluctant to impose periods of incarceration on people who are likely to be relatively short term employees earning little more than the minimum wage. Although in some cases ticket takers or clerks are involved with the business itself, more often they are not. With some justification in fact, therefore, some judges perceive that people who would but for fortune be clerks in candy stores rather than clerks in pornography outlets should not receive jail time for having taken the only job that may have been available to them.

Whatever the causes of undersentencing, it is apparent that with the current state of sentencing the criminal laws have very little deterrent effect on the sale or distribution of legally obscene materials. Although we have recommended mandatory minimum sentences for second and further offenses, some of us are not convinced that this will actually serve as a solution, for in many areas mandatory sentencing may result in plea bargains for lesser charges, or prosecutorial reluctance to proceed against someone the prosecutor is unwilling to see go to jail. None of us are certain about the effects of mandatory sentencing, and mandatory sentencing may be appropriate if it comports with practices for crimes of equivalent seriousness within a jurisdiction. But we fear that the problem of undersentencing is more complex than simple, and to the extent that mandatory minimum sentencing may in practice be only cosmetic, it should not blunt efforts to look further for the roots of the problem of undersentencing.

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[53] In this connection, we should note our support (and our specific recommendation in that section of this Report) for use of the Racketeer Influenced and Corrupt Organizations (RICO) Act as a method of requiring many of those convicted of multiple and substantial obscenity violations to disgorge the profits from their enterprises. Whether in this form or another, methods of attacking profits, or the assets purchased with those profits, seem likely to be more effective financial deterrents than substantially smaller fines.

The problem of undersentencing is likely to affect the level of prosecution. When the end result of even a successful prosecution is a fine that is insignificant compared to the profits of the operation, or at most a period of incarceration that is so minimal as to have insignificant deterrent effect, the incentive to prosecute diminishes on the part of both prosecutors and law enforcement personnel. The potentially light sentenc magnifies the fact that obscenity prosecutions are likely to b properly perceived as necessitating a high expenditure of tim and resources as well as being, in terms of the likelihood o securing a conviction, high risk enterprises. The defendant will usually be represented by sophisticated lawyers with mandate to engage in a vigorous and extensive defense. It woul be a rare prosecutor who did not understand the differenc between prosecuting a mugger represented by a young publi defender with too many cases and too little time and resource on the one hand, and, on the other, prosecuting a pornography distributor who has a team of senior trial lawyers at his disposal and who will probably receive only a minimal sentence even if convicted.

In addition to the fact that obscenity prosecutions are seen as high risk and low reward ventures for prosecutors and law enforcement personnel, it is also the case that being involved in obscenity investigation or obscenity prosecution is likely to be lower in the hierarchy of esteemed activities within a prosecutorial office or within a police department. This may stem in part from the extent to which the personal views of many people within those departments are such as to treat these matters as not especially serious. The extent to which this is so, and the extent to which there are other factors we have been unable to isolate, we cannot at this time determine. But we are confident that the phenomenon exists.

The upshot of all of the above is that we are forced to conclude that the problem of underprosecution cannot be remedied simply by saying that enforcement of the obscenity laws ought to have a higher priority, or simply by providing more money for enforcement, or simply by increasing the amount of community and political pressure on all those involved in the law enforcement effort. We do not discount any of these approaches, as all have proved effective at times when used in conjunction with other techniques of changing law enforcement practices, but it is clear that the dynamics are sufficiently complex that no one remedy for the problem will suffice. There is a multiplicity of facto explaining the lack of enforcement, and changing that situati will require a multiplicity of remedies. We urge that many the specific recommendations we suggest be taken seriously.

### 6.3.3 Federalism

We operate in a nation with dual systems of criminal la The laws of most states make the sale, exhibition, distribution of obscene material a crime, but federal law al makes it a crime to use the mails or the facilities of intersta commerce for such purposes. In thinking about law enforcement recurring issue is the proper sphere of operation for federal l and the proper sphere of operation for state law.

Putting aside the enforcement of federal laws agai child pornography, which we discuss in Chapter 7 of this Part, federal law enforcement efforts are now directed almo exclusively against large nationwide obscenity distribut networks with known connections with organized crime. With exceptions, there is little enforcement of federal obscenity l

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[54] In addition to trying to achieve some degree of analytic clarity, we put aside child pornography in this context because we note the extent to which prosecutors and other law enforcement officials have frequently relied on the number of child pornography prosecutions to give a general impression of vigorous enforcement of the obscenity laws in their jurisdiction. On closer examination, it has usually appeared that there was a great deal of activity with respect to child pornography, and virtually none with respect to the obscenity laws. We do not of course deny the importance of allocating large amounts of resources to child pornography. We do not believe, however, that any purpose is served by clouding the existing state of affairs with respect to the enforcement of the obscenity laws.

in cases not involving some strong suspicion of organized crime involvement. For example, despite reasonably clear evidence that sophisticated multi-state operations dealing in large quantities of legally obscene material have substantial contacts with localities such as Los Angeles and New York City, there has been essentially no federal prosecution of the obscenity laws in the Central District of California and the Southern District of New York. We mention these particular districts only because they are large and have within them particular concentrations of either production or distribution of legally obscene materials. But the pattern of federal non-involvement is not limited to these districts. The nationwide pattern of little federal prosecution seems to have changed somewhat within the past months, most likely as a result of the publicity associated with this Commission, but it remains a safe conclusion that enforcement of federal law has been minimal.

We note the extent to which it has become common to assume that whenever there is a large problem the solution ought to be a federal one. Witness after witness representing some branch of state law enforcement complained that the real problem was the lack of federal support. Although we sympathize with these witnesses in their attempts to get more support for their efforts, we are dismayed at the unwillingness of the states to assume the bulk of the responsibility for enforcement of the criminal law. Although we do not deny the extent of federal responsibility, and although we do not deny that some states have budgetary crises that approach in seriousness if not in magnitude that of the federal government, there comes a point at which the ready solution of more federal money for even the most worthy endeavors can no longer be the strategy of first resort. We are aware of our responsibilities, now a matter of law as well as good sense, to look for alternatives other than major additional expenditures of federal funds with respect to our own rather tha someone else's agenda, and we urge that states consider their la enforcement responsibilities mindful of these considerations. W also note that in our federal system primary responsibility fo law enforcement has always been with the states. The polic power of the states has commonly been taken to include primar responsibility for dealing with the very types of harms at whic the obscenity laws are addressed. And the constitutional commitment to a federal system assumes that state involvement i preferable to federal in areas, such as most of the criminal law in which local decisions may vary. We see no reason not to make in general, the same assumptions with respect to the enforcemen of obscenity laws.

Despite our view that primary law enforcemen responsibilities rest with the states, federal law and feder law enforcement have an essential role to play in the enforceme of the obscenity laws. Most of the material that we find mo harmful is distributed throughout the country by means of lar and sophisticated distribution networks. It is precisely wi respect to this kind of massive and complex interstate (a international) operation that the special skills and resources of federal investigative agencies are most needed, and to which the nature of federal criminal prosecution is most suited. Prosecutions can, as with the MIPORN prosecutions in Miami, join in a single prosecution people from different states who are integral and controlling parts of the same enterprise. And the federal judicial apparatus is often more suited than that of the states where evidence and witnesses must be secured from throughout the country.

Thus, we do not see the scope of federal prosecution as being limited to cases involving demonstrable connections with organized crime. In any case in which the evidence indicates a multi-state operation of substantial size and sophistication, federal rather than or in addition to state law enforcement is most appropriate. By concentrating vigorously on such operations, federal prosecutorial and investigative resources will be reserved for the cases in which federal involvement has the greatest comparative advantage, while still reserving to the states that primary role in more local law enforcement that is at the core of our system of federalism.

### 6.3.4 What Should Be Prosecuted?

In Chapter 5 of this Part we discussed at length the increasing trend in the scientific research and in general discussions of this subject to recognize that not all pornographic items are identical. There are substantial differences in the content of such materials, and we have tried in the rough categorization of Chapter 5 of this Part to express our sympathy with these efforts to advance the clarity of thinking about the issue of pornography. Indeed, we hope that we have contributed to those efforts. As the natural consequence of these efforts to recognize the differences among pornographic materials, we urge that thinking in terms of these or analogous categories be a part of the analysis of the total law enforcement effort.

The categories we discussed in Chapter 5 of this Par encompass a range of materials far broader than the legall obscene, and thus, in the context of this discussion of th criminal law, a range of materials far broader than what we kno can be prosecuted consistent with the Constitution. Nevertheless, these categories, with the exception of nudity no involving the lewd exhibition of the genitals, exist within a well as around the legally obscene, material that has been c could be criminally prosecuted consistent with the Mille standard, there exist materials that are sexually violent materials that are non-violent but degrading, and materials tha although highly sexually explicit and offensive to many, conta neither violence nor degradation. In light of ou conclusions in Chapter 5 of this Part, we would urge th prosecution of obscene materials that portray sexual violence treated as a matter of special urgency. With respect to sexual violent materials the evidence is strongest, societal consens is greatest, and the consequent harms of rape and other forms sexual violence are hardly ones that this or any other society can take lightly. In light of this, we would urge that the prosecution of legally obscene material that contains violence be placed at the top of both state and federal priorities in enforcing the obscenity laws.[55]

With respect to materials that are non-violent yet degrading, the evidence supporting our findings is not as strong as it is with respect to violent materials. And on the available evidence, we have required more in the way of assumption to draw the connection between these materials and sexual violence, sexual aggression, and sex discrimination.

Nevertheless, these assumptions have significant support on the evidence and in our own logic and experiences, and the causal evidence remains for us strong enough to support our conclusions. None of us hesitate to recommend prosecution of those materials that are both degrading and legally obscene.

If choices must be made, however, prosecution of these materials might have to receive slightly lower priority than sexually violent materials, but this is not to say that we view action against degrading materials as unimportant.

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[55] In discussing priorities here, we exclude from consideration child pornography. As we explain in Chapter 7 of this Part, child pornography involves a different range of materials, a different kind of "industry," a different kind of offender, and consequently different approach to the problems of law enforcement. We treat it separately because it is so different. We do not in so doing wish to suggest that the problems are any less. If anything they are greater, but they remain different, and little purpose is served by dealing with child pornography as part of the larger category of pornography.

With respect to materials in the third category we have identified, materials that are neither violent nor degrading, the issues are more difficult. There seems to be no evidence in the social science data of a causal relationship with sexual violence, sexual aggression, or sex discrimination. These three harms do not exhaust the possible harms, however, and our disagreements regarding this category reflect disagreements that abound in this society at this time. Many people believe that making sex into an essentially public act is a harm of major proportions, a harm that is compounded by its commercialization. To others legitimizing through this material either a wide range of traditionally prohibited sexual practices, or legitimizing sex without love, marriage, commitment, or even affection is the primary harm with which people should be concerned. Some people have recognized the extent to which material of this variety is likely to wind up in the hands of children, and thus to frighten children or to encourage children to model their behavior on what they have seen, and would take this to be a sufficient condition for serious concern. And some people note the importance to any society of some set of shared moral values, including values relating to sexuality, and look upon the proliferation of the material even in this category as an attack on something that is a precondition for a community. On the other hand, many people see these concerns as less problematic, or matters appropriate for individual choice and nothing more, or see in some of the use of these materials beneficial effects which ought also to be taken into account. We cannot resolve these disagreements among ourselves or for society, but the fact of disagreement remains a fact. Regardless of who is right and who is wrong about these issues, and we do not purport to have clear, definitive, or easy answers, the substantially lower level of societal consensus about these matters is an empirical fact.[56] To some of us, this substantially lower level of societal consensus, when combined with the absence for these materials of scientific evidence showing a causal connection with sexual violence, sexual aggression, or sex discrimination, leaves a category as to which this society is less certain and as to which one array of concerns, present with the two previous categories, is absent. More than this is necessary to recommend deregulation or even to support a recommendation not to prosecute what has long been taken to be regulable. And we will not so easily discount the substantial arguments that can be made for regulation by recommending a drastic change in what has been general practice for most of the history of this nation. Nevertheless, the factors of lower societal consensus and absence of causal connection with sexual violence, aggression, or discrimination are to some of us germane to the question of priority. With respect, therefore, to legally obscene material within this category it seems entirely appropriate to some of us, at least in terms of long-term commitment of resources, for prosecutors and law enforcement personnel to treat such material differently from material containing sexual violence or degradation of women. Should a community wish to allocate sufficient resources to obscenity enforcement that material in this category is prosecuted as vigorously as that in the previously discussed category, we find that an entirely legitimate decision for a community to make. But if a community does not wish to devote resources to that extent, or if a community believes that the material in this category, even if legally obscene, is not cause for the stringent sanctions of the criminal law, then it would seem to some of us appropriate for that community to concentrate its efforts on material that is either violent or degrading.

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[56] Indeed, all of the survey evidence supports the view that there are substantial disparities between societal views regarding restrictions on materials depicting sexual violence and materials depicting sex alone.

On this issue we are, as would be expected given our differences with respect to the harms associated with this category, deeply divided. Some of us would strongly urge that all legally obscene material be prosecuted with equal vigor, and would not only urge the communities of which we are part to take this course, but would condemn those that did not. Others of us see the prosecution of material within this category as something that should quite consciously be treated as a lower priority matter, and still others of us see the questions with respect to this category as being primarily for the community to make, with community decisions to prosecute vigorously, or not at all, or somewhere in between, as entitled to equal respect.

Although we are divided on this question, the division is likely on the current state of the law to be more philosophical than real. Pursuant to Miller, material is obscene only if, among numerous other factors, it offends the community in which it is made available. As a result, in those communities in which material within this category is not considered especially problematic, the material will not be considered legally obscene. And in those communities in which material within this category is condemned, it will offend community standards and thus, if the other requirements of Miller are met, will be legally obscene.[57] As a result, therefore, the existing legal approach incorporates within the definition of obscenity the views of a particular community. The question whether to prosecute material in this category, therefore, assuming that the decision to prosecute is in effect a community decision, will turn into the question, under current law, whether the material is obscene at all.

### 6.3.5 The Special Prominence of the Printed Word

In oral testimony before us, in written submissions, and in numerous published discussions of the question of pornography, fears have been expressed about the dangers of excess censorship. As we have explained in Chapter 3 of this Part, we are sensitive to the risks of excess censorship beyond the bounds of what the First Amendment or good sense should allow, but we have found many of these claims to be little more than hyperbole, warning against censorship in the abstract but providing little in the way of real evidence that the possibility exists.

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[57] We emphasize that it is the values of the entire community that are relevant, and we do not suggest here that it is appropriate for a prosecutor or law enforcement official to substitute his or her values for that of the community as a whole.

That the evidence presented has been weak, however, does not mean that we should ignore the possibility that in some areas prosecutions might be attempted of works of undoubted merit in the name of obscenity law, or that obscenity prosecution might be threatened as a way of exercising impermissible control over works that are not even close to being legally obscene. We heard testimony, for example, about a local prosecutor who, presented with a citizen complaint about a not even plausibly obscene book in the local library, sought out a written statement of a literary justification for the book instead of telling the complainant that the book quite simply was not obscene. And as we have investigated similar incidents, and listened to claims about excess censorship, it has become apparent to us that the vast majority of these concerns have surrounded books consisting entirely of the printed word text only, without photographs or even drawings.

In thinking about these concerns, we note that material consisting entirely of the printed word can be legally obscene, as the Supreme Court held in 1973 in Kaplan v. California.[58] And we have seen in the course of our inquiries books that would meet this standard - books consisting of nothing other than descriptions of sexual activity in the most explicit terms, plainly patently offensive to the vast majority of people, and plainly devoid of anything that could be considered literary, artistic, political, or scientific value.

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[58] 413 U.S. 115 (1973).

Although many such books exist, and although they constitute part of all the categories of material we have identified, they seem to be the least harmful materials within the various categories. Because they involve no photographs, there need be no concerns with those who are actually used in the process of production. And the absence of photographs necessarily produces a message that seems to necessitate for its assimilation more real thought and less almost reflexive reaction than does the more typical pornographic item. There remains a difference between reading a book and looking at pictures, even pictures printed on a page.

All of us would strongly urge prosecution of legally obscene material containing only text when the material is either targeted at an audience of children or when its content involves child molestation or any form of sexual activity with children. Because of the effect of the child pornography laws, photographic material involving children is becoming less available, and this material, which is likely to encourage acts of child molestation, occupies a significant portion of textual obscenity. There is little prosecution of this material now, and we hope that that situation will change.

Some of us, however, except for material plainly describing sexual activity with minors or targeted to minors, would urge that materials consisting entirely of the printing word simply not be prosecuted at all, regardless of content. There is for all practical purposes no prosecution of such materials now, so such an approach would create little if any change in what actually occurs. But by converting this empirical fact into a plain statement even the possibility of prosecuting a book will be eliminated. If this is eliminated even as a possibility, those of us who take this position believe that the vast majority of potential abuses can be quelled and the vast majority of fears alleviated with what will be at most a negligible reduction in law enforcement effectiveness. Most likely there will be no effect at all on law enforcement, although those who take this position nevertheless deplore many of the books, a substantial proportion of which involve violence or degradation. But from this perspective, what is lost in the ability to prosecute this material is more than compensated for by the symbolic and real benefits accompanying the statement that the written word has had and continues to have a special place in this and any other civilization.

Others of us, however, while sharing this special concern for the written word, would not adopt such a rigid rule, and would retain both in theory and in practice the ability to prosecute obscene material regardless of the form in which the obscenity is conveyed. Especially in light of the fact that we have seen many books that are devoted to sexual violence and sexual degradation, some of us fear that giving carte blanche to such material, regardless of current prosecutorial practices, is to send out exactly the wrong signal. Those of us who take this position share the concern for the written word, but believe that that concern can best be reflected in ways other than providing a license for material that, although presented in verbal form, seems substantially similar to the forms of pictorial obscenity that concern us.

Although we are deeply divided on the question of a clear rule prohibiting prosecution (except in cases involving or directed at children), we share each others concerns. Those of us who would adopt a clear rule nevertheless regret some of its consequences, and deplore much of the textual obscenity we have seen. And those of us who reject the idea of a clear rule understand the concerns for purely verbal communication, and urge that prosecution of entirely textual material be undertaken only with extraordinary caution.

### 6.4 Regulation By Zoning

For many people the harms caused by pornography relate in part to the effects on communities and neighborhoods of the establishments in which such materials are commonly sold. Whether it be a peep show, an "adults only" pornographic theatre, or a so-called "adult bookstore," there seems widespread agreement that virtually all such establishments are largely detrimental to the neighborhoods in which they are located. Some of the negative consequences arise from the style of the establishments themselves, which usually have garish lights and signs advertising the nature of what is to be found within in no uncertain terms. Other consequences flow from the clientele, who are often people that many citizens would just as soon be somewhere else. And such establishments are likely to exist in close proximity to areas in which prostitution exists, and in close proximity to establishments such as bars featuring live sexually oriented entertainment. As a result, most people would consider such establishments environmentally detrimental, and there is some evidence indicating a correlation between crime rates and the particular neighborhoods in which such establishments exist.

Although some communities have attempted to deal with pornography outlets through criminal prosecution, others have attempted zoning regulation more narrowly tailored to alleviating the consequences discussed in the previous paragraph. These regulations generally take two forms. One is a dispersal regulation, in which zoning ordinances prohibit location of such an establishment within a specified distance of another such establishment. The principle behind dispersal ordinances is that of scattering these establishments throughout a large geographic area, so that no concentration of them can have a major deleterious effect on any one neighborhood. Alternatively, some communities have endeavored to concentrate these establishments, attempting through zoning to limit them to one or just a few parts of the community, usually remote from residential areas, and frequently remote as well from certain business districts.

In order for such ordinances to be effective, they must be able to describe the establishments they regulate in terms at least slightly broader than the *Miller* definition of obscenity. Were the *Miller* standard to be used, the administrative enforcement mechanism commonly in force with respect to zoning would become bogged down in the more cumbersome procedures characteristic of full trials. Most such ordinances, therefore, regulate establishments that specialize in sexually explicit material, and usually the ordinance contains a definition of sexually explicit material that is more precise but more expansive than *Miller*.[59] Although such ordinances include more than could criminally be prosecuted under *Miller*, the Supreme Court has approved zoning regulation of this variety, first in 1976 in *Young v. American Mini Theatres, Inc.*,[60] and then again in February 1986 in *City of Renton v. Playtime Theatres, Inc.*[61]

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[59] *For example*, the Detroit ordinance that was before the Supreme Court in the *Young* case defined as an "adult establishment" any establishment concentrating on offering material emphasizing "specified sexual activities" or "specified anatomical areas." "Specified sexual activities" were defined to include, for example, "Human Genitals in a state of sexual stimulation or arousal," "Acts of human masturbation, sexual intercourse or sodomy," and "Fondling or other erotic touching of human genitals, public region, buttock or female breast." The definition of "Specified anatomical areas" was similarly broader than would be permitted by *Miller* if the aim were total prohibition. To the extent that zoning approaches concentrate on establishments specializing in this material, we note that such approaches may have the effect of providing incentives for attempts to introduce more plainly pornographic material into more mainstream outlets.

[60] 427 U.S. 50 (1976).

[61] 54 U.S.L.W. 4160 (Feb. 25, 1986).

The most significant qualification imposed by the Court is the requirement that the zoning regulation not have the effect of a total prohibition.[62] The result, therefore, is that if communities wish to restrict the location of such "adults only" establishments, they may do so, but they may not under the guise of zoning banish them altogether.

Witnesses who have testified before us about zoning approaches in their localities have by and large not endorsed these approaches. Most of these witnesses, however, have been law enforcement personnel who would prefer prohibition to relocation. The zoning approach, which is not aimed at prohibition, is not surprisingly a poor tool if prohibition is the desired result.

Moreover, in most localities these ordinances contain "grandfather" clauses, eliminating from the restrictions those establishments already in place on the date of enactment of the ordinance.[63] Thus the result has often been to prevent the problem from growing, but has done little to diminish the extent of an existing problem.

It has been suggested that zoning may be the ideal solution to the problem of pornography, because it allows people who wish access to this material to have such access without having its sale intrude on the lives and sensibilities of the majority of the population who wish to have nothing to do with it. This solution is ideal, however, only under the presupposition that the material is not indeed harmful except insofar as it causes offense to non-users. With respect to sexually violent material and degrading material, we have found that the evidence does not support such a modest view of the likely consequences, and thus we reject an equivalently modest remedy for what we take to be harmful material, even when its access is restricted to willing buyers. If indeed the material in these categories is harmful, as we have found it to be, we cannot consistent with that finding urge a remedy of moving it to another part of town.

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[62] On this point, see, Schad v. Mt. Ephraim, 452 U.S. 61 (1981).

[63] Although such clauses may be required by state law, we note that nothing in the First Amendment, or in federal constitutional law generally, would require such an approach.

With respect to materials that are neither violent nor degrading, however, both the evidence of harms and the level of societal consensus are less, and zoning might possibly be more appropriate for establishments restricting their stock to materials in this category. As suggested above in Section 6.3.4, the absence of evidence for this material of a causal connection with sexual violence, sexual aggression, or sex discrimination may suggest lower prosecutorial priority within a system of enforcement of the criminal laws. But even for localities that may choose this course, the offensiveness of these materials and the deleterious effects on the neighborhoods in which they are made available may still be seen to justify some restriction. If this is the case, then zoning may be the appropriate way to deal with materials of this variety, although many of us are concerned that in practice such an approach will concentrate such establishments in or near the most economically disadvantaged segments of a locality. Some of us fear that zoning may be a way for those with political power to shunt the establishments they do not want in their own neighborhoods into the neighborhoods of those with less wealth and less political power.

Restrictions on public display, whether through the criminal law or zoning ordinances, are in effect another form of zoning. The concept here is that there may be many materials that, regardless of their alleged harmlessness, and regardless of the fact that they are not legally obscene, ought not to be displayed in a manner that offends unwilling viewers. Moreover, the public display does not differentiate between passersby who are adults and those who are children, and taking into account the likelihood that children will be exposed to this material at inappropriate ages justifies restrictions that might seem harsh in settings involving only adults. Even those most likely to oppose obscenity regulation would, we suspect, have little difficulty in principle with restricting sexually explicit material from billboards. None of us has difficulty with this either, even when extended somewhat beyond the legally obscene. We believe that public display regulations, including but not limited to the control of advertising materials displayed on the exterior of adult establishments, and including but not limited to the display ordinances requiring shielding of the covers of sexually explicit magazines, are fully justifiable measures in a society that has long restricted indecent exposure. If copulating in a public park may be restricted, we are not troubled by regulations prohibiting billboards depicting copulation.

We ought finally to mention in this section the attempts in a number of communities to restrict "adults only" pornographic establishments through the use of nuisance laws and related legal remedies. Nuisance laws, when applied to sexually explicit materials, are attempts to serve many of the interests that generated the zoning approach, but here the aim is prohibition rather than relocation. The desired result in most such legal actions is an injunction against further operation of the establishment. For that reason, all effective uses of this approach have thus far been found unconstitutional. Even where an establishment has been found guilty of a criminal obscenity violation, the law as of this moment does not permit the finding of obscenity with respect to one magazine, or one film, to justify what is in fact a restriction on other films and other magazines not yet determined to be legally obscene, and therefore presumptively protected by the First Amendment. Total prohibition, therefore, on the state of the law right now, seems much more likely to stem from substantial criminal penalties for those involved with such establishments than from civil remedies directed in some way directed against the establishment and not the person.

### 6.5 The Civil Rights Approach to Pornography

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Within the last several years a substantial amount of the public discussion of pornography has centered around a proposed anti-pornography ordinance drafted by two scholars, Andrea Dworkin and Catherine MacKinnon, and proposed in one form or another in a number of localities, most notably Minneapolis, Minnesota; Los Angeles, California; Cambridge, Massachusetts; and Indianapolis, Indiana. The only community actually to adopt such an ordinance was Indianapolis, which on June 11, 1984, drafted an ordinance providing civil remedies against pornography. The ordinance defined pornography as:

> [T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; [or] (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The ordinance has subsequently been held unconstitutional by the United States District Court for the Southern District of Indiana,[64] and that decision has been affirmed by the United

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[64] American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).

States Court of Appeals for the Seventh Circuit.[65] Recently the Seventh Circuit's decision has been affirmed, on the merits but without opinion, by the Supreme Court of the United States.[66] The basis for the finding of unconstitutionality was the way in which the definition set forth above was substantially more inclusive than that in Miller. To the extent that legislation restricts material beyond the legally obscene, that legislation must confront an array of First Amendment-inspired barriers that few if any statutes could meet. This statute could not surmount those obstacles, for much the same reason, according to the courts, that attempted restrictions on members of the American Nazi Party and the Ku Klux Klan could not surmount those obstacles. Once the comparatively narrow realm of Miller-tested legal obscenity is left, virtually no restrictions on communication based on the point of view expressed, no matter how wrong or harmful it may be, are permitted by the First Amendment.

That this ordinance with this definition was properly held unconstitutional, however, should not deflect attention from three other features of the ordinance and of the support it engendered. First, we are in substantial agreement with the motivations behind the ordinance, and with the goals it represents. The harms at which the ordinance is aimed are real and the need for a remedy for those harms is pressing. That we understand both the harms and the urgent need to remedy these harms should be apparent from the discussion in Chapter 5 of this Part. Moreover, although we feel that the safer and better course is to proceed within existing constitutional boundaries, our recommendations regarding criminal prosecution for legally obscene material containing sexual violence or degradation are largely consistent with what this ordinance attempts to do, although the approach we recommend clearly will reach less material. In effect, this ordinance reaches material containing sexually violent or sexually degrading material when it is sexually explicit. The only constitutionally permissible approach, however, is to reach material containing sexually violent or sexually degrading material when it is legally obscene, and that in effect is what we have strongly urged here.

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[65] American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

[66] Hudnut v. American Booksellers Ass'n, 54 U.S.L.W. 3560 (Feb. 24, 1986).

In addition, the ordinance proposed a civil remedy, rather than a criminal one. We have thought about the issue of a civil remedy, because the question whether there should be a civil or a criminal remedy is analytically distinct from the question of what material will be reached by that remedy. A civil remedy could be combined with all or part of the category of material reached by Miller, and we have thought about the possibility of civil rather than criminal sanctions with respect to Miller-tested obscenity. Although we recognize that details would remain to be worked out, in large part relating to who would have the ability to bring an action against whom, we endorse the concept of a civil remedy so long as it takes place within existing constitutional limitations. Although we do endorse the concept of a civil remedy, and although we do recognize that much of the material we have seen directly implicates in a harmful way the civil rights of women, we do not ignore the deterrent effect on publishers of being forced to defend a wide range of suits that might raise claims that are totally without merit, but which would still require at least a preliminary defense. Although we recognize that occasionally prosecutors might be overzealous, we have no doubt that the average prosecutor is substantially less likely to be overzealous than the most zealous potential plaintiff. We have heard from a wide range of people in the course of our work, and some have employed definitions of pornography or have expressed views about what ought to be restricted that are far beyond what any of us would conceivably tolerate. We are unwilling to have each of these people as potential plaintiffs. We are not willing to put a publisher to a defense in every case in which someone thinks that material is obscene or pornographic. If a procedure could be devised that provided for some preliminary determination by a judge or magistrate that the suit was plausible before the complaint was allowed to be filed, our fears would evaporate, and with such a procedure we believe that civil remedies available to a wide range of people ought seriously to be contemplated. And in any event, civil remedies that restricted the right of action to, for example, people who were compelled to perform in obscene material or people who were compelled to view obscene material would not have the problems associated with a potentially enormous class of plaintiffs, and ought to be considered even more seriously.

Finally, the ordinance and the support for it properly focused attention on the people who are frequently coerced into performing in sexually explicit films, or into posing for sexually explicit pictures. And even where coercion in the contemporary legal sense is absent, the conditions of employment unquestionably deserve close attention. We agree with these concerns for the participants, and we agree that legal concern for participants need not be limited to the question of child pornography. We believe that civil and other remedies ought to be available to those who have been in some way injured in the process of producing these materials. But we are confident that the remedies of restricting the material itself, at least beyond the category of the legally obscene, permissible in the case of child pornography, remain constitutionally impermissible with respect to adults. We believe, therefore, that the appropriate remedy in the case of adults is that which is directed at the conduct itself, and we include in a later Chapter of this Report a special report directed exclusively to harms to performers, and possible remedies for those harms.

### 6.6 Obscenity and the Electronic Media

Where legally obscene material is transmitted by radio, television, telephone, or cable, the same legal sanctions are or should be available as are available for any other form of distribution or exhibition. Although federal law has long prohibited the transmission of legally obscene materials by radio, television, and telephone, the advent of cable television left a gap in the law. The Cable Communications Policy Act of 1984 attempts to provide criminal penalties for anyone transmitting over any cable system "any matter which is obscene or otherwise unprotected by the Constitution." A number of states have or are on the verge of adopting similar changes in their obscenity laws to include cable transmission, and we support those legislative efforts to ensure that the law keeps up with technological changes. To the extent that obscene material appears on cable television, we urge prosecution to the same extent and with the same vigor as we do with respect to any other form of distribution of obscene material. We note that this has not always been the case, and we urge that enforcement efforts directed to legally obscene material, in whatever regulatory form those enforcement efforts might take, be as aggressive with respect to cable transmission of the legally obscene as with other forms of distribution of the legally obscene.

Under existing law, however, the Federal Communications Commission has the power to impose some sanctions against certain broadcasting of sexually explicit language or pictures over radio and television even where the material is not legally obscene. In FCC v. Pacifica Foundation,[67] the Supreme Court upheld the constitutionality of this form of regulation, in the context of sanctions against a radio station for a daytime broadcast of George Carlin's "Seven Dirty Words" monologue, which is in fact about the FCC regulations, and which uses repeatedly the words the FCC prohibits.

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[67] 438 U.S. 726 (1978).

As we have explained in Chapter 4 of this Part and in a later Part, there is a great deal available on cable television today that is sexually explicit but which is not legally obscene. Some of this material contains sexual violence, some of it is degrading as we have used that term here, and some of it is, although rather explicit, neither violent nor degrading. In almost all of these cases the films shown have simulated rather than actual sexual activity, most have a rather sustained story line, and many are mainstream and highly acclaimed Hollywood productions.

With respect to these materials that are not legally obscene, they are beyond the reach of the law as it stands today. Nevertheless, we have been urged to recommend changes in the law so that material which is "indecent" as well as legally obscene might be kept from cable television to the same (or greater) extent as it has been kept from broadcast non-subscriber radio and television. We have not adopted these suggestions, however, although it is an issue on which we are deeply divided. Some of us believe that enforcement of obscenity laws with respect to such material, when combined with vigorous enforcement of the "lockbox" requirements so that children may be prevented by their parents from seeing such material, are all that is appropriate at this time. Some of us are persuaded by the fact that the suggestions made to us are all, on the existing state of the law, unconstitutional, with all of the courts that have confronted the issue deciding that cable cannot be controlled by the standards applicable to broadcast non-subscriber television.[68] Some of us are skeptical about Pacifica itself, and do not wish to extend to new areas a principle that we find dubious even with respect to broadcast media. In light of the existence of, for example, serious and non-pictorial sexual advice programs as well as serious mainstream motion pictures containing more explicit sexuality than would be available on broadcast television, extension of the limitations of broadcast television to cable seems highly likely to restrict that which simply ought not to be restricted. Some of us question the current state of the law, but would urge change in the direction of permitting restriction of pure violence rather than indecency. Some of us are also uncomfortable once again about taking on any doubtful causes and courses of constitutional adjudication when existing law seems ufficient for the more extreme cases. And some of us reject all of the above, and feel that cable television, even with ockboxes, is so similar to broadcast television that regulation f more than the legally obscene should be permitted with respect to cable just as it is when the airwaves rather than wires are the medium of transmission. Some of us who hold this view would prefer somewhat broader definitions of what can permissibly be regulated in many areas. And others of us who take this position are comfortable with the existing definition of obscenity, but feel that television is a medium with a special power and a special intrusiveness in contemporary society.

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[68] Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); ommunity Television of Utah v. Roy City, 555 F. Supp. 1164 D. Utah 1982); HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 982). The Supreme Court has yet to be faced with the estion.

These are difficult questions, going not only to the roots of First Amendment doctrine and theory, but also to the nature of television in American life. As with other fundamental issues, we are unable to agree here, and as a result there is no consensus among us that would justify urging that regulation of cable encompass more than the legally obscene.

Many of the same considerations apply to the regulation of those telephone services, commonly referred to as Dial-a-Porn, that provide sexually explicit messages. As we discuss at length in a later Part, there is no doubt that the number and variety of these services is increasing, and that they have generated substantial citizen concern. Some of the concerns relate to the way in which these services are advertised, and some relate to the messages themselves regardless of who uses the service. Most of the concerns, however, relate to the frequent use of these services by minors, a concern that seems accentuated by the extent to which many of the services seem designed to cater to the particular asexual perceptions of teenagers rather than adults. We have heard a number of these messages, and we have little doubt that the bulk of them could be considered to be legally obscene under existing law.[69] Although they use words rather than pictures, even those of us who would refuse to apply obscenity law to materials containing only the printed word would not apply that principle to these materials. Apart from the fact that many seem implicitly if not explicitly directed at minors, the nature of the spoken voice, especially in this context, contains enough of the characteristics of the visual image that we have no difficulty in saying that such material should be dealt with consistent with our recommendations concerning films, tapes, and pictorial magazines.

Although once again we have been urged to recommend new laws that are substantially more encompassing than the existing definition of the legally obscene, we find such approaches both unnecessary and undesirable. The vast bulk of this material seems to us well within the Miller definition, and thus could be prosecuted in accordance with the concerns and the priorities we have urged here. In light of that, we see few advantages and substantial risks in going further. But we also urge that there be laws allowing the prosecution of such legally obscene material, and we urge as well that such laws be enforced. There seems now to be little enforcement, and in light of the frequency with this material is used by minors, we deplore the failure to have and to enforce obscenity laws with respect to material of this type.

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[69] We believe this to be the case even when the messages are directed at and available only to adults. To the extent that they are directed at and available to minors, the application of the test for obscenity may properly take that into account. Ginsberg v. New York, 390 U.S. 629 (1968).

## 6.7 Enforcing Both Sides of the Law

Both in Chapter 3 of this Part and in this Chapter we have emphasized our belief that conscientious enforcement of existing obscenity laws and the dictates of the First Amendment are not inconsistent. But our confidence in this conclusion will be increased if all of those with law enforcement responsibilities would recognize their responsibilities to enforce the existing principles of the First Amendment as conscientiously and as vigorously as they enforce the obscenity laws. The Constitution is a law too, and we expect that anyone who has taken an oath to uphold the law will recognize that they must uphold the First Amendment as well.

We make these general observations because we acknowledge that many citizens, sincerely and for very good reasons, would want the law to do more than it is now constitutionally able to do, and more than we feel it ought constitutionally be able to do. Many of these citizens will find an outlet for their views in the fully legitimate and appropriate private actions that we discuss in Chapter 8 of this Part. But many others will make requests or demands on law enforcement personnel, sometimes out of ignorance about the constitutional constraints but often out of an understandable frustration that the Constitution, in the name of long run values, often prevents us from doing what seems quite justifiable in the short run.

When faced with such requests or demands, we hope that law enforcement personnel will recognize their responsibilities to interpose their legal responsibilities at that time. They must refuse to take any action that would in any way be governmentally threatening to those who are exercising their constitutional rights, and they must be willing to explain to their angry constituents why they have and must do so. We recognize that this may not always be easy in a world in which the citizens properly expect their elected and appointed officials to be responsive to the desires of the citizenry. But we should point out as well that most of our recommendations about increased or at least maintained law enforcement presuppose this attitude, and presuppose an environment in which the limitations of the First Amendment are enforced by all public officials at the point at which they first matter. To assume that enforcement of the obscenity laws is for law enforcement personnel while enforcement of the Constitution is for the courts is to misunderstand the nature of the system. It may also, ultimately, be to threaten the constitutional underpinnings of what we have urged in this Report. In the long run, the enforcement of the obscenity laws depends on the willingness of those who do the enforcing to respect the appropriate constitutional limitations. If that respect does not take place in practice and at the first instance, neither courts nor commissions such as this one will be able to be as confident of the current accommodation between conflicting goals as we now are.

# Chapter 7

# Child Pornography

## 7.1 The Special Horror of Child Pornography

What is commonly referred to as "child pornography" is not so much a form of pornography as it is a form of sexual exploitation of children. The distinguishing characteristic of child pornography, as generally understood, is that actual children are photographed while engaged in some form of sexual activity, either with adults or with other children. To understand the very idea of child pornography requires understanding the way in which real children, whether actually identified or not, are photographed, and understanding the way in which the use of real children in photographs creates a special harm largely independent of the kinds of concerns often expressed with respect to sexually explicit materials involving only adults.

Thus, the necessary focus of an inquiry into child pornography must be on the process by which children, from as young as one week up to the age of majority,[70] are induced to engage in sexual activity of one sort or another, end the process by which children are photographed while engaging in that activity. The inevitably permanent record of that sexual activity created by a photograph is rather plainly a harm to the children photographed. But even if the photograph were never again seen, the very activity involved in creating the photograph is itself an act of sexual exploitation of children, and thus the issues related to the sexual abuse of children end those related to child pornography are inextricably linked. Child pornography necessarily includes the sexual abuse of a real child, and there can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography *is* child abuse.

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[70] A significant amount of sexually explicit material includes children over the applicable age of majority who look somewhat younger. Because people who are actually minors are not used in this type of publication, it would not qualify as child pornography, although it might still be legally obscene. In general, this variety of material does not cater to the pedophile, but instead to those who prefer material with young-looking models.

### 7.2 Child Pornography as Cottage Industry

In addition to understanding the way in which child pornography is defined by its use of real children engaged in real sexual activity, it is important to understand the way in which the "industry" of child pornography is largely distinct from any aspect of the industry of producing and making available sexually explicit materials involving only adults.

A significant aspect of the trade in child pornography, and the way in which it is unique, is that a great deal of this trade involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers. As we discuss in more detail in a later Part, some of these child abusers are situational, abusing children on occasion but not restricting their sexual preferences to children. Others are preferential, not only preferring children as a means for achieving sexual satisfaction, but seeking out children in order to satisfy this desire. We have heard substantial evidence that both situational and preferential child molesters frequently take photographs of children in some sexual context. Usually with non-professional equipment, but sometimes in a much more sophisticated manner, child abusers will frequently take photographs of children in sexual poses or engaged in sexual activity, without having any desire to make commercial use of these photographs. At times the child abuser will merely keep the photograph as a memento, or as a way of recreating for himself the past experience. Frequently, however, the photograph will be given to another child abuser, end there is substantial evidence that a great deal of "trading" of pictures takes place in this manner.[71] The desire to have collections of a large number of photographs of children seems to be a common, although not universal, characteristic of many pedophiles. Some of this exchange of photographs takes place in person, a great deal takes place through the mails, and recently a significant amount of the exchange has taken place by the use of computer networks through which users of child pornography let each other know about materials they desire or have available.

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[71] There is also evidence that commercially produced pictures of children in erotic settings, or in non-erotic settings that are perceived by some adults as erotic, are collected and used by pedophiles. There is little that can be done about the extent to which, for example, advertisements for underwear might be used for vastly different purposes than those intended by the photographer or publisher, but we feel it nevertheless important to identify the practice.

In addition to the primarily non-commercial trade in chi pornography, there appears to be a commercial network for chi pornography, consisting to a significant extent of forei magazines that receive the very kinds of pictures described the previous paragraph, and then sell in magazine for collections of these non-commercially produced photographs These magazines will frequently contain advertisements fo private exchange of pictures in addition to publishing pictur themselves.[72] Although the publication of the magazines, almos exclusively abroad, is itself a commercial enterprise, it doe not appear as if most of the contributors contribute for th purpose of commercial gain. And although the publication o these magazines is largely foreign, there is substantial evidenc that the predominant portion of the recipients of an contributors to these magazines are American.

Prior to the late 1970s, when awareness and concern abou child pornography escalated dramatically, commercially produce and distributed child pornography was more prevalent than it i now. It was in the late 1970s that this awareness and concer started to be reflected in major law enforcement initiatives, state and federal, against child pornography. When the Suprem Court in 1982 approved of child pornography laws whose coverag was not restricted to the legally obscene, these enforcement efforts accelerated, and the sum total of these enforcement - efforts has been to curtail substantially the domestic commercial production of child pornography. This is not to say that it does not exist. There is a domestic commercial child pornography industry, but it is quite clandestine, and not nearly as large as the non-commercial use of and trade in non-commercially produced sexually explicit pictures of children.

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[72] Some of this private exchange is quite informal, but there is evidence that more formal and elaborate underground networks for the exchange of these pictures exist.

Although there now appears to be comparatively little domestic commercial production of child pornography, there remains a significant foreign commercial industry, and much of this material is available in the United States. Some of this material is in magazine form, some are photographic motion picture films, but increasingly, as with much of the adult material, video tapes are dominating the market. None of this material is available openly, however. We received some testimony that commercially produced child pornography was available "under the counter" in some establishments selling adult sexually explicit material. A number of experienced police officers testified to having no actual knowledge that material is available in this way, but others indicated that they had either heard of its availability or had themselves seen its availability in rare circumstances. We have also heard evidence about more surreptitious networks for the distribution of this material, and we have heard some evidence about the way that this material is sold through the mails. We have little doubt that there is some distribution in the United States of commercially produced material, although the extremely clandestine nature of the distribution networks makes it difficult to assess the size of this trade.

Although we note, therefore, that there is some commercially produced material, efforts to deal with the problem of child pornography will fail if they overestimate the extent of the commercial side of the practice, and underestimate the non-commercial side. The greatest bulk of child pornography is produced by child abusers themselves in largely "cottage industry" fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children. That does not make the problem of child pornography unimportant. On the contrary, to the extent that it is an aid to and a part of a problem that is unfortunately prevalent and plainly outrageous, child pornography, in both its creation and its distribution, is of unquestioned seriousness. But it is different, in virtually every aspect of its definition, creation, distribution, and use. Serious consideration of the issue of child pornography must begin with this fact.

### 7.3 Child Pornography, the Law, and the First Amendment

Because the problem of child pornography is so inherently different from the problems relating to the distribution of legally obscene material, it should be no surprise to discover that tools designed to deal with the latter are largely ineffective in dealing with the former. The problems to which child pornography regulation is addressed are numerous, but four stand out most prominently.

The first problem is that of the permanent record of the sexual practices in which children may be induced to engage. To the extent that pictures exist of this inherently nonconsensual act, those pictures follow the child up to and through adulthood, and the consequent embarrassment and humiliation are harms caused by the pictures themselves, independent of the harms attendant to the circumstances in which the photographs were originally made.[73]

Second, there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children. Children are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it.[74] As with the problem of the

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[73] We refer in this regard to our specific recommendation regarding possession of child pornography. We do not believe that a photograph of a child engaged in sexual activity should be part of someone else's "collection," even if that collection remains in the home.

[74] We note that there seems to be significant use of adult sexually explicit material for the same purpose. Child molesters will frequently show sexually explicit pictures of adults to children for the purpose of convincing a child that certain practices are perfectly acceptable because adults engage in them with some frequency. We are greatly disturbed by this practice, although we do not take the phenomenon as sufficient to justify restrictions we would not otherwise endorse. Many of the materials used for this purpose are not even close to being legally obscene, and, in the words of Justice Felix Frankfurter, we do not want to "burn the house to roast the pig." Butler v. Michigan, 353 U.S. 380, 383 (1957). Nevertheless, we have no doubt that the practice

permanent record, we see here a danger that is the dire
consequence of the photographs themselves, a danger that
distinct from the harms related to the original making of t
picture.

Third, photographs of children engaged in sexual practic
with adults often constitute an important form of eviden
against those adults in prosecutions for child molestatio
Given the inherent difficulties of using children as witnesse
making it possible for the photographs to be evidence of t
offense, or making the photographs the offense itself, provid
an additional weapon in the arsenal against sexual abuse
children.

Finally, an argument related to the last is the unquestion
special harm to the children involved in both the commercial a
the noncommercial distribution of child pornography. Althou
harms to performers involved would not otherwise be taken to be
sufficient condition for restriction of the photographs rath
than the underlying conduct, the situation with children is of
different order of magnitude. The harm is virtually unanimous
considered to be extraordinarily serious, and the possibility
consent is something that the law has long considered, a
properly so, to be an impossibility. As a result, forms

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exists, and we have no doubt that it is dangerous insofar as it helps break down the resistance of children to sexual advances by adults. At the very least, we strongly urge that children be warned about the practice in the course of whatever warnings about sexual advances by adults are being employed.

deterrence of the underlying conduct that might not otherwise be considered advisable may be considered so with respect to photographs of children. If the sale or distribution of such pictures is stringently sanctioned, and if those sanctions are equally stringently enforced, the market may decrease, and this may in turn decrease the incentive to produce those pictures.

As part of the previous justification, it ought to be obvious that virtually all child pornography is produced surreptitiously, and thus, even with vigorous enforcement efforts, enforcement will be difficult. Enforcement efforts against the more accessible product of the process rather than or in addition to the less accessible process itself may enable the realities of enforcement to track the magnitude of the problem.[75]

For all of these, as well as other, reasons, a number of states, including New York, enacted around 1980 laws directed at "child pornography" itself. These laws defined child pornography not in terms of the legally obscene, but rather in terms of any portrayal of sexual conduct by a child, or in terms that were somewhat similar to this. Under these statutes, the sale or distribution of any photographic depiction of a real child engaged in sexual activity was made unlawful, regardless whether the photograph, or magazine, or film was or could determined to be legally obscene pursuant to *Miller* *California*.[76]

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[75] As much as we urge the most vigorous enforcement of child pornography laws with respect both to commercial and noncommercial production, possession, and distribution, we recognize that the problem of child abuse is larger than the problem of child pornography. We urge vigorous enforcement of child pornography laws as an important way of fighting child abuse, but if it is treated as the only weapon, or the major weapon, a great deal that needs doing will remain undone.

Because these new child pornography statutes encompass material not legally obscene pursuant to *Miller*, and therefo encompassed material presumptively protected by the Fir Amendment, a constitutional challenge ensued. But in *New York* *Ferber*,[77] the Supreme Court unanimously rejected t constitutional challenges for reasons substantially similar those discussed just above. The Court noted the undeniab "compelling" and "surpassing" interests involved in protecti children against this variety of exploitation, and also rest its conclusion on the fact that "[t]he value of permitting li performances and photographic reproductions of children engag in lewd sexual conduct is exceedingly modest, if not de minim We consider it unlikely that visual depictions of childr performing sexual acts or lewdly exhibiting their genitals wou often constitute an important and necessary part of a litera performance or scientific or educational work." Given th minuscule amount of First Amendment protection, therefore, t Court determined that "[w]hen a definable class of material, su as that covered [by the New York statute], bears so heavily pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."

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[76] 413 U.S. 15 (1973). *Miller* is discussed extensively above in Chapter 4 of this Part.

[77] 458 U.S. 747 (1982).

As a result of Ferber, virtually every state, as well as the United States, now prohibits by its criminal law the production, promotion, sale, exhibition, or distribution of photographs of children engaged in any sexual activity regardless of whether the material is legally obscene under the Miller standards. After Ferber these laws are clearly constitutionally sound, and none of us has any quarrel with the constitutionality of these statutes.

### 7.4 Enforcement of the Child Pornography Laws

In Chapter 4 of this Part we discussed the enforcement of state and federal obscenity laws, and described what we see as a rather consistent pattern of underenforcement of these laws. We do not reach the same conclusion with respect to the child pornography laws. It is plain to us that every unenforced violation of the child pornography laws is an underenforcement that ought to be remedied. We believe that many cases remain uninvestigated, and we believe that state and federal prosecution of child pornography, commercial and noncommercial, needs to be even more vigorous. Nevertheless, it remains the case that the child pornography laws seem now to be the subject of a substantial amount enforcement efforts on both the state and local levels. The federal statistics are illustrative. From January 1, 1978, to February 27, 1986, one hundred individuals were indicted in the federal system for violation of the federal obscenity laws, and of those indicted seventy-one were convicted.[78] During that same time period, 255 individuals were indicted in the federal system for violation of federal child pornography laws, and of those 215 were convicted. Although these statistics themselves are highly suggestive of a substantial disparity, we believe that, if anything, the statistics understate the disparity. For one thing it is highly likely that in absolute terms there are more violations of the federal obscenity laws than there are violations of the child pornography laws. In addition, it was not until final adoption of the Child Protection Act of 1984 on May 21, 1984, that federal law, following Ferber, finally eliminated the requirement of "obscenity," and of the 255 indictments in fact 183 were secured in the period from May 21, 1984, through February 27, 1986.

This comparatively aggressive approach to enforcement of the federal child pornography laws has been matched by equally vigorous efforts in the vast majority of states. Although we urge even more aggressive enforcement of the child pornography laws at both state and federal levels, we see less systematic underinvestigation, underprosecution, and undersentencing than seems to exist with respect to enforcement of the obscenity laws.[79] Child pornography seems to be a matter that judges, prosecutors, and law enforcement personnel have, with few exceptions, taken seriously. We are glad that they do, and we urge them to take it even more seriously.

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[78] See, supra note 52.

[79] There are, however, impediments to investigation and prosecution that are specially related to any prosecution involving sexual abuse of children. One is the difficulty we

In terms of taking these matters even more seriously, we note again the inseparable relationship between child pornography and child abuse. To take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa. It is apparent that as of the date of this Report the sexual abuse of children is being taken increasingly seriously in this country, and we applaud that increased concern for a problem that has long been both largely unspoken and largely avoided. That situation is changing rapidly, and the increased attention to child pornography is part of the increased attention being given to all forms of sexual abuse of children, whether photographs are part of the act or not. We do not hesitate to support further efforts, in public education, in the education of children, and in law enforcement, to continue to attempt to diminish the sexual abuse of children, regardless of the form it takes.

None of us doubt that child pornography is extraordinarily harmful both to the children involved and to society, that dealing with child pornography in all of its forms ought to be

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address in our specific recommendations. Another is the fact that on occasion parents have themselves been involved in the illegal activity. And there seems still to be some reluctance to impose stiff sentences upon people who look and act otherwise "normal." To that extent a significant problem in dealing with sexual abusers of children is the mistaken and dangerous assumption that all or most of those people are self-evidently "weird."

treated as a governmental priority of the greatest urgency, and that an aggressive law enforcement effort is an essential part of this urgent governmental priority. Our unanimity of vigor about child pornography does not surprise us, and we expect that it will not surprise others. We hope that society will respond accordingly.

# Chapter 8

# The Role Of Private Action

## 8.1 The Right to Condemn and the Right to Speak

We are a government commission, and thus most of what we have to say is addressed to government. Yet it is simply mistaken to assume that citizen concerns need be exclusively or even largely channeled into governmental action. We feel it appropriate, therefore, to spend some time in this Report addressing the issue of how citizens might appropriately and lawfully put into practice their own concerns.

At the outset, it should be clear that citizens have every right to condemn a wide variety of material that is protected, and properly so, by the First Amendment. That governmental action against a certain variety of communication is unwise and unconstitutional does not mean that the communication is valuable, and does not mean that society is better off for having it. Earlier in this Report we used the examples of the Nazis and the Ku Klux Klan to illustrate this point, and we could add many more examples to this list. That the Communist Party is a lawful organization does not prevent most Americans from finding its tenets abhorrent, and the same holds true for a wide variety of sexually oriented material. Much of that material is, as we have explained, protected by the First Amendment, but it does not follow that the material is harmless, or that its proliferation is good for society.

The act of condemnation, of course, is itself central to what the First Amendment is all about. Just as speaking ou against government has long been part of what citizens are bot entitled and indeed encouraged to do, so too is speaking out o matters of concern not directly related to the functioning o government. Expressing a point of view about sexually explici materials in general, or about particular sexually explici materials, is plainly the very kind of activity that Firs Amendment properly protects. To the extent that citizens have concerns about the kinds of sexually explicit material that are available in contemporary America, they should not only recognize that the First Amendment protects and encourages their right to express these concerns loudly and often, but should as well appreciate the fact that in many aspects of our lives to keep quiet is to approve. Moreover, communities are made by what people say and do, by what people approve and what people disapprove, and by what people tolerate and what people reject. For communities, and for the sense of community, community acceptance and community condemnation are central to what a community is.

Although we are concerned here primarily with protest or related action against materials that citizens find harmful, immoral, or objectionable, we do not wish to discount the value of protest directed at government when citizens wish government to do something it is not currently doing. Protest and related activities are entirely appropriate if citizens are dissatisfied with the work of their law enforcement officials, their prosecutors, their administrators and executives, their legislators and their judges. It is certainly appropriate for citizens to protest the work of this Commission. We encourage citizens to be actively involved in what their government is doing, and if they feel that the government is not doing enough, or is doing too much, with respect to prosecution of prosecutable materials, then they should make their wishes known to those who have the power to make changes.

### 8.2 The Methods of Protest

It should be apparent from the foregoing that citizens need not feel hesitant in condemning that which they feel is worthy of condemnation. Moreover, they need feel no hesitation in taking advantage of the rights they have under the First Amendment to protest in more visible or organized form. They may, of course, form or join organizations designed expressly for the purposes of articulating a particular point of view. They may protest or picket or march or demonstrate in places where they are likely to attract attention, and where they will have the opportunity to persuade others of their views. The right of citizens to protest is of course coextensive with the right of publishers to publish, and we do not suggest that citizens not exercise their First Amendment rights as vigorously and as frequently as do those who publish their views in print, on film or tape, or over the airwaves.

Of some special relevance in this context is the practice of protesting near the premises of establishments offering material that some citizens may find dangerous or offensive or immoral.

We recognize that such forms of protest may at times discourage patrons who would otherwise enter such establishments from proceeding, but that, we believe, is part of the way in which free speech operates in the United States. In the context of a labor dispute, picket lines frequently have this very kind of discouraging effect, and the Supreme Court, even outside of the labor context, has recognized the free speech rights of those people who would protest on public streets or sidewalks but in close proximity to business establishments whose business practices they find objectionable.[80] For citizens to protest in the vicinity of a pornography outlet is fully within the free speech traditions of this country, and so too is protest in the vicinity of an establishment only some of whose wares the protesters would find objectionable. If people feel that businesses, whether a local store or a multinational corporation, are behaving improperly, it is their right and their obligation to make those views known.

Somewhat related to on-site or near-site protesting, in terms of coercive force, is the boycott, in which a group of citizens may refuse to patronize an establishment offering certain kinds of magazines, or tapes, or other material, and may also urge others to take similar action. At times the boycott may take the form of action against an advertiser, where people may express their views about corporate responsibility by refusing to buy certain products as long as the producer of those products advertises in certain magazines, or on certain television shows. Boycotts attempt to take advantage in organized fashion of the needs for business establishments to have customers. They are thus attempts to mobilize consumer power towards controlling the products and services made available in the market.

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[80] In fact, in Organization for a Better Austin v. Keefe, 402 U.S. 415(1971), the Court prohibited an injunction directed against people who were passing out leaflets in the neighborhood of the residence of a person whose business practices they found objectionable.

In a number of purely business contexts, an organized boycott would violate the antitrust laws, whose aim, in part, is to encourage competition by discouraging some forms of organized economic pressure. But consumer boycotts for social and political aims have been determined by the Supreme Court to be protected by the First Amendment,[81] and thus we do not hesitate to note that a consumer boycott, premised on the view that corporations can often do as much, for good or for evil, as government, is well within the First Amendment-protected methods of protesting business activities that citizens may find objectionable.

## 8.3 The Risks of Excess

In pointing out the citizen's undoubted right to protest written, printed, or photographic material that he or she finds harmful, objectionable, immoral, or offensive, we are not so naive as to ignore that this right to protest may often b carried to excess. Citizens who protest, or boycott, or picket, or distribute leaflets, or march, or demonstrate ar unquestionably exercising their First Amendment rights. But jus like the First Amendment rights of some of those who deal i sexually explicit materials, these rights may be exercise harmfully or unwisely.

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[81] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 1982).

Thus, we have no doubt that a citizen has the right t refuse to shop at a store that sells the National Review or The New Republic because the citizen disagrees with the political point of view of one of those magazines. And we have no doubt that a citizen who urges his friends and others to do the same is still well within what the First Amendment does and ought to protect. But we also have no doubt that the citizen who exercises his First Amendment rights in this manner could be criticized by most people, and most of us would strongly support that criticism. Apart from the question of governmental interference, there are positive values associated with the free flow of ideas and information, and society is the loser when that process is unduly stifled. Just as with the free speech rights of those who trade in sexually explicit materials, the free speech rights to protest objectionable material may be exercised in a lawful but societally harmful manner.

Thus we have little doubt that in exercising their First Amendment rights to protest material that they find objectionable, some people will protest material that quite simply ought to be encouraged freely to circulate in this society. We also have little doubt that protest activity may very well inhibit this process of circulation. If large numbers of people refused to patronize bookstores that sold Sinclair Lewis' Elmer Gantry because it dealt with sexual immorality by a minister, or if people picketed the residences of booksellers who sold James Joyce's Ulysses because of its sexual themes and language, this society would, quite simply, be the worse for it. These examples are of course extreme, but the fears that many arguably valuable but sexually frank works of fiction and non-fiction will be stifled not by governmental action but by social pressure is real.

We have no solutions to this dilemma. We believe it fully appropriate for citizens to protest against material they find objectionable, and we know that at times this protest activity will go too far, to the detriment of all of us. This society is a free society not only because of the First Amendment, but also because of generally held attitudes of tolerance. We encourage people to object to the objectionable, but we think it even more important that they tolerate the tolerable.

### 8.4 The Importance of Education and Discussion

By focusing on protests, boycotts, and related activities, we have here emphasized conduct that is largely negative and reactive. Although we see a central place for communicative activities that are negative and reactive, we do not wish to suggest that this is all that can or should be done. In particular, we note the extent to which education is ultimately central to much that we have been discussing. In the broadest sense, not just with respect to the education that takes place in the schools, and with respect to values and awareness as well as to facts, education is the real solution to the problem of pornography.

We have identified harms that seem to be caused by certain sexually explicit material, but many of those harms are the result of how images affect attitudes, and of how images affect behavior. But the ability of an image to affect behavior is not only a function of what that image is saying or doing, but of what other images are part of the array of stimuli received by an individual. We recognize the extent to which an attraction to one sexual stimulus rather than another may significantly be caused by individual characteristics formed at a relatively early age, in many cases before exposure to any highly sexually explicit material. But we recognize as well that if images can cause certain forms of behavior, as we believe they can and as the evidence shows, then images ought as well to be able to prevent behavior, or cause different behavior.

The images that might cause different behavior can, of course, come from numerous sources. So can the messages that would lead people in even greater numbers to reject the view that sexual violence is sometimes appropriate, to reject the view that women enjoy being physically coerced into sex, to reject the view that women's primary sexual role is to satisfy the desires of men, to reject the view that sex ought to be an essentially public act, and to reject the view that sex outside of love, marriage, commitment, or affection is something to be sought. These positive messages might address all of these underlying attitudes. They might also address pornography more explicitly, discussing its dangers to individuals and to society. The messages might come from family members, or teachers, or religious leaders, or political figures, or the messages might come, perhaps especially, from the mass media.

Ultimately, a significant part of the concern with pornography is a concern about negative messages. One way to deal with negative messages is to prevent them from being sent, or to prevent them from being reinforced once they are sent. Action against harmful pornography, whether by law or by social action or by individual condemnation, is in the final analysis a negative approach. It is an attempt to eliminate a harmful message, and such attempts are frequently appropriate. But they cannot succeed by themselves. These essentially negative and reactive efforts must be accompanied by positive efforts. If there are certain attitudes that people ought not to have, then what attitudes ought people to have, and how can those attitudes best be inculcated? What will be taught in the schools? What forms of behavior will be publicly admired? What will the mass media encourage? What will we expect of each other in interpersonal behavior? The list goes on and on.

We commenced this Report by noting that we were a Commission appointed by the Attorney General of the United States, and therefore felt a special responsibility to concentrate our efforts towards law and law enforcement. It is appropriate to conclude, however, with this recognition of the limits of law and the limits of law enforcement. A wide range of behaviors, from telling the truth to our friends to eating with knives and forks rather than fingers, is channeled quite effectively without significant legal involvement. And another wide range of behaviors, from jaywalking to income tax evasion, persists even in the face of attempts by law to restrict it. To know what the law can do, we must appreciate what the law cannot do. We believe that in many respects the law can serve important controlling and symbolic purposes in restricting the proliferation of certain sexually explicit material that we believe harmful to individuals and to society. But we know as well that to rely entirely or excessively on law is simply a mistake. Law may influence belief, but it also operates in the shadow of belief. And beliefs, of course, are often a product of deeply held moral, ethical, and spiritual commitments. That foundation of values is the glue that holds a democracy, which functions according to the will of the majority, together. Government can and must protect the interests of the minority, to be sure. But law enforcement cannot entirely compensate for or regulate the consequences of bad decisions if the majority consistently chooses evil or error. If there are attitudes that need changing and behaviors that need restricting, then law has a role to play. But if we expect law to do too much, we will discover only too late that few of our problems have been solved.

# PART THREE

## Chapter 1

## Introduction

Based upon their collective observations, and the information provided through testimony, the following recommendations are advanced by this Commission.

### I. RECOMMENDATIONS FOR THE JUSTICE SYSTEM AND LAW ENFORCEMENT AGENCIES

### A. RECOMMENDATIONS FOR CHANGES IN FEDERAL LAW

1. CONGRESS SHOULD ENACT A FORFEITURE STATUTE TO REACH THE PROCEEDS AND INSTRUMENTS OF ANY OFFENSE COMMITTED IN VIOLATION OF THE FEDERAL OBSCENITY LAWS.

2. CONGRESS SHOULD AMEND THE FEDERAL OBSCENITY LAWS TO ELIMINATE THE NECESSITY OF PROVING TRANSPORTATION IN INTERSTATE COMMERCE. A STATUTE SHOULD BE ENACTED TO ONLY REQUIRE PROOF THAT THE DISTRIBUTION OF THE OBSCENE MATERIAL "AFFECTS" INTERSTATE COMMERCE.

3. CONGRESS SHOULD ENACT LEGISLATION

MAKING IT AN UNFAIR BUSINESS PRACTICE AND AN UNFAIR LABOR PRACTICE FOR ANY EMPLOYER TO HIRE INDIVIDUALS TO PARTICIPATE IN COMMERCIAL SEXUAL PERFORMANCES.

4. CONGRESS SHOULD AMEND THE MANN ACT TO MAKE ITS PROVISIONS GENDER NEUTRAL.

5. CONGRESS SHOULD AMEND TITLE 18 OF THE UNITED STATES CODE TO SPECIFICALLY PROSCRIBE OBSCENE CABLE TELEVISION PROGRAMMING.

6. CONGRESS SHOULD ENACT LEGISLATION TO PROHIBIT THE TRANSMISSION OF OBSCENE MATERIAL THROUGH THE TELEPHONE OR SIMILAR COMMON CARRIER.

## B. RECOMMENDATIONS FOR CHANGES IN STATE LAW

7. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, OBSCENITY STATUTES CONTAINING THE DEFINITIONAL REQUIREMENT THAT MATERIAL BE "UTTERLY WITHOUT REDEEMING

SOCIAL VALUE" IN ORDER TO BE OBSCENE TO CONFORM WITH THE CURRENT STANDARD ENUNCIATED BY THE UNITED STATES SUPREME COURT IN MILLER V CALIFORNIA.

8. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, OBSCENITY STATUTES TO ELIMINATE MISDEMEANOR STATUS FOR SECOND OFFENSES AND MAKE ANY SECOND OFFENSE PUNISHABLE AS A FELONY.

9. STATE LEGISLATURES SHOULD ENACT, IF NECESSARY, FORFEITURE PROVISIONS AS PART OF THE STATE OBSCENITY LAWS.

10. STATE LEGISLATURES SHOULD ENACT A RACKETEER INFLUENCED CORRUPT ORGANIZATIONS(RICO) STATUTE WHICH HAS OBSCENITY AS A PREDICATE ACT.

## C. RECOMMENDATIONS FOR THE UNITED STATES DEPARTMENT OF JUSTICE

11. THE ATTORNEY GENERAL SHOULD DIRECT THE UNITED STATES ATTORNEYS TO EXAMINE THE OBSCENITY PROBLEM IN THEIR RESPECTIVE DISTRICTS,

IDENTIFY OFFENDERS, INITIATE INVESTIGATIONS, AND COMMENCE PROSECUTION WITHOUT FURTHER DELAY.

12. THE ATTORNEY GENERAL SHOULD APPOINT A HIGH RANKING OFFICIAL FROM THE DEPARTMENT OF JUSTICE TO OVERSEE THE CREATION AND OPERATION OF AN OBSCENITY TASK FORCE. THE TASK FORCE SHOULD CONSIST OF SPECIAL ASSISTANT UNITED STATES ATTORNEYS AND FEDERAL AGENTS WHO WILL ASSIST UNITED STATES ATTORNEYS IN THE PROSECUTION AND INVESTIGATION OF OBSCENITY CASES.

13. THE DEPARTMENT OF JUSTICE SHOULD INITIATE THE CREATION OF AN OBSCENITY LAW ENFORCEMENT DATA BASE WHICH WOULD SERVE AS A RESOURCE NETWORK FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AGENCIES.

14. THE UNITED STATES ATTORNEYS SHOULD USE LAW ENFORCEMENT COORDINATING COMMITTEES TO COORDINATE ENFORCEMENT OF THE OBSCENITY LAWS AND TO MAINTAIN

SURVEILLANCE OF THE NATURE AND EXTENT OF THE OBSCENITY PROBLEM WITHIN EACH DISTRICT.

15. THE DEPARTMENT OF JUSTICE AND UNITED STATES ATTORNEYS SHOULD USE THE RACKETEER INFLUENCED CORRUPT ORGANIZATION ACT (RICO) AS A MEANS OF PROSECUTING MAJOR PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.

16. THE DEPARTMENT OF JUSTICE SHOULD CONTINUE TO PROVIDE THE UNITED STATES ATTORNEYS WITH TRAINING PROGRAMS ON LEGAL AND PROCEDURAL MATTERS RELATED TO OBSCENITY CASES AND ALSO SHOULD MAKE SUCH TRAINING AVAILABLE TO STATE AND LOCAL PROSECUTORS.

17. THE UNITED STATES ATTORNEYS SHOULD USE ALL AVAILABLE FEDERAL STATUTES TO PROSECUTE OBSCENITY LAW VIOLATIONS INVOLVING CABLE AND SATELLITE TELEVISION.

## D. RECOMMENDATIONS FOR STATE AND LOCAL PROSECUTORS

18. STATE AND LOCAL PROSECUTORS SHOULD PROSECUTE PRODUCERS OF OBSCENE MATERIAL UNDER EXISTING LAWS INCLUDING THOSE PROHIBITING PANDERING AND OTHER UNDERLYING SEXUAL OFFENSES.

19. STATE AND LOCAL PROSECUTORS SHOULD EXAMINE THE OBSCENITY PROBLEM IN THEIR JURISDICTION, IDENTIFY OFFENDERS, INITIATE INVESTIGATIONS, AND COMMENCE PROSECUTION WITHOUT FURTHER DELAY.

20. STATE AND LOCAL PROSECUTORS SHOULD ALLOCATE SUFFICIENT RESOURCES TO PROSECUTE OBSCENITY CASES.

21. STATE AND LOCAL PROSECUTORS SHOULD USE THE BANKRUPTCY LAWS TO COLLECT UNPAID FINES.

22. STATE AND LOCAL PROSECUTORS SHOULD USE ALL AVAILABLE STATUTES TO PROSECUTE OBSCENITY VIOLATIONS INVOLVING CABLE AND SATELLITE TELEVISION.

23. STATE AND LOCAL PROSECUTORS SHOULD ENFORCE EXISTING CORPORATE LAWS TO PREVENT THE FORMATION, USE AND ABUSE OF SHELL CORPORATIONS WHICH SERVE AS A SHELTER FOR PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.

24. STATE AND LOCAL PROSECUTORS SHOULD ENFORCE THE ALCOHOLIC BEVERAGE CONTROL LAWS THAT PROHIBIT OBSCENITY ON LICENSED PREMISES.

25. GOVERNMENT ATTORNEYS, INCLUDING STATE AND LOCAL PROSECUTORS, SHOULD ENFORCE ALL LEGAL REMEDIES AUTHORIZED BY STATUTE.

## E. RECOMMENDATIONS FOR FEDERAL LAW ENFORCEMENT AGENCIES

26. FEDERAL LAW ENFORCEMENT AGENCIES SHOULD CONDUCT ACTIVE AND THOROUGH INVESTIGATIONS OF ALL SIGNIFICANT VIOLATIONS OF THE OBSCENITY LAWS WITH INTERSTATE DIMENSIONS.

27. THE INTERNAL REVENUE SERVICE SHOULD AGGRESSIVELY INVESTIGATE VIOLATIONS OF THE TAX LAWS COMMITTED BY PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.

## F. RECOMMENDATIONS FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES

28. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD PROVIDE THE MOST THOROUGH AND UP-TO-DATE TRAINING FOR INVESTIGATORS INVOLVED IN ENFORCING THE OBSCENITY LAWS.

29. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD ALLOCATE SUFFICIENT PERSONNEL TO CONDUCT INTENSIVE AND THOROUGH INVESTIGATIONS OF ANY VIOLATIONS OF THE OBSCENITY LAWS.

30. STATE AND LOCAL LAW ENFORCEMENT OFFICERS SHOULD TAKE AN ACTIVE ROLE IN THE LAW ENFORCEMENT COORDINATING COMMITTEES.

31. STATE AND LOCAL REVENUE AUTHORITIES MUST INSURE TAXES ARE COLLECTED FROM BUSINESSES DEALING IN OBSCENE MATERIALS.

32. STATE AND LOCAL PUBLIC HEALTH AUTHORITIES SHOULD INVESTIGATE CONDITIONS WITHIN "ADULTS ONLY" PORNOGRAPHIC OUTLETS AND ARCADES AND ENFORCE THE LAWS AGAINST ANY HEALTH VIOLATIONS FOUND ON THOSE PREMISES.

## G. RECOMMENDATION FOR THE JUDICIARY

33. JUDGES SHOULD IMPOSE SUBSTANTIAL PERIODS OF INCARCERATION FOR PERSONS WHO ARE REPEATEDLY CONVICTED OF OBSCENITY LAW VIOLATIONS AND WHEN APPROPRIATE SHOULD ORDER PAYMENT OF RESTITUTION TO IDENTIFIED VICTIMS AS PART OF THE SENTENCE.

## H. RECOMMENDATIONS FOR THE FEDERAL COMMUNICATIONS COMMISSION

34. THE FEDERAL COMMUNICATIONS COMMISSION SHOULD USE ITS FULL REGULATORY POWERS AND IMPOSE APPROPRIATE SANCTIONS AGAINST PROVIDERS OF OBSCENE DIAL-A-PORN TELEPHONE SERVICES.

35. THE FEDERAL COMMUNICATIONS COMMISSION SHOULD USE ITS FULL REGULATORY POWERS AND IMPOSE APPROPRIATE SANCTIONS AGAINST CABLE AND SATELLITE TELEVISION PROGRAMMERS WHO TRANSMIT OBSCENE PROGRAMS.

## I. RECOMMENDATION FOR OTHER FEDERAL ORGANIZATIONS

36. THE PRESIDENT'S COMMISSION ON UNIFORM SENTENCING SHOULD CONSIDER A PROVISION FOR A MINIMUM OF ONE YEAR IMPRISONMENT FOR ANY SECOND OR SUBSEQUENT VIOLATION OF FEDERAL LAW INVOLVING OBSCENE MATERIAL THAT DEPICTS ADULTS.

## II. RECOMMENDATIONS FOR THE REGULATION OF CHILD PORNOGRAPHY

37. CONGRESS SHOULD ENACT LEGISLATION REQUIRING PRODUCERS, RETAILERS, OR DISTRIBUTORS OF SEXUALLY EXPLICIT VISUAL DEPICTIONS TO MAINTAIN RECORDS CONTAINING CONSENT FORMS AND PROOF OF PERFORMERS' AGES.

38. CONGRESS SHOULD ENACT LEGISLATION PROHIBITING PRODUCERS OF CERTAIN SEXUALLY EXPLICIT VISUAL DEPICTIONS FROM USING PERFORMERS UNDER THE AGE OF TWENTY-ONE.

39. CONGRESS SHOULD ENACT LEGISLATION TO PROHIBIT THE EXCHANGE OF INFORMATION CONCERNING CHILD PORNOGRAPHY OR CHILDREN TO BE USED IN CHILD PORNOGRAPHY THROUGH COMPUTER NETWORKS.

40. CONGRESS SHOULD AMEND THE CHILD PROTECTION ACT FORFEITURE SECTION TO INCLUDE A PROVISIOn WHICH AUTHORIZES THE POSTAL INSPECTION SERVICE TO CONDUCT FORFEITURE ACTIONS.

41. CONGRESS SHOULD AMEND 18 U.S.C.

S2255 TO DEFINE THE TERM "VISUAL DEPICTION" AND INCLUDE UNDEVELOPED FILM IN THAT DEFINITION.

42. CONGRESS SHOULD ENACT LEGISLATION PROVIDING FINANCIAL INCENTIVES FOR THE STATES TO INITIATE TASK FORCES ON CHILD PORNOGRAPHY AND RELATED CASES.

43. CONGRESS SHOULD ENACT LEGISLATION TO MAKE THE ACTS OF CHILD SELLING OR CHILD PURCHASING, FOR THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS, A FELONY.

## B. RECOMMENDATIONS FOR STATE LEGISLATION

44. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, CHILD PORNOGRAPHY STATUTES TO INCLUDE FORFEITURE PROVISIONS.

45. STATE LEGISLATURES SHOULD AMEND LAWS, WHERE NECESSARY, TO MAKE THE KNOWING POSSESSION OF CHILD PORNOGRAPHY

A FELONY.

46. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, LAWS MAKING THE SEXUAL ABUSE OF CHILDREN THROUGH THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS, A FELONY.

47. STATE LEGISLATURES SHOULD ENACT LEGISLATION, IF NECESSARY, TO MAKE THE CONSPIRACY TO PRODUCE, DISTRIBUTE, GIVE AWAY OR EXHIBIT ANY SEXUALLY EXPLICIT VISUAL DEPICTIONS OF CHILDREN OR EXCHANGE OR DELIVER CHILDREN FOR SUCH PURPOSE A FELONY.

48. STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, CHILD PORNOGRAPHY LAWS TO CREATE AN OFFENSE FOR ADVERTISING, SELLING, PURCHASING, BARTERING, EXCHANGING, GIVING OR RECEIVING INFORMATION AS TO WHERE SEXUALLY EXPLICIT MATERIALS DEPICTING CHILDREN CAN BE FOUND.

9. STATE LEGISLATURES SHOULD ENACT

OR AMEND LEGISLATION, WHERE NECESSARY, TO MAKE CHILD SELLING OR CHILD PURCHASING FOR THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS, A FELONY.

50. STATE LEGISLATURES SHOULD AMEND LAWS, WHERE NECESSARY, TO MAKE CHILD PORNOGRAPHY IN THE POSSESSION OF AN ALLEGED CHILD SEXUAL ABUSER WHICH DEPICTS THAT PERSON ENGAGED IN SEXUAL ACTS WITH A MINOR SUFFICIENT EVIDENCE OF CHILD MOLESTATION FOR USE IN PROSECUTING THAT INDIVIDUAL WHETHER OR NOT THE CHILD INVOLVED IS FOUND OR IS ABLE TO TESTIFY.

51. STATE LEGISLATURES SHOULD AMEND LAWS, IF NECESSARY, TO ELIMINATE THE REQUIREMENT THAT THE PROSECUTION IDENTIFY OR PRODUCE TESTIMONY FROM THE CHILD WHO IS DEPICTED IF PROOF OF AGE CAN OTHERWISE BE ESTABLISHED.

52. STATE LEGISLATURES SHOULD ENACT OR AMEND LEGISLATION, IF NECESSARY,

WHICH REQUIRES PHOTO FINISHING LABORATORIES TO REPORT SUSPECTED CHILD PORNOGRAPHY.

53. STATE LEGISLATURES SHOULD AMEND OR ENACT LEGISLATION, IF NECESSARY, TO PERMIT JUDGES TO IMPOSE A SENTENCE OF LIFETIME PROBATION FOR CONVICTED CHILD PORNOGRAPHERS AND RELATED OFFENDERS.

## C. RECOMMENDATIONS FOR FEDERAL LAW ENFORCEMENT AGENCIES

54. THE STATE DEPARTMENT, THE UNITED STATES DEPARTMENT OF JUSTICE, THE NITED STATES CUSTOMS SERVICE, THE NITED STATES POSTAL INSPECTION ERVICE, THE FEDERAL BUREAU OF NVESTIGATION AND OTHER FEDERAL GENCIES SHOULD CONTINUE TO WORK WITH THER NATIONS TO DETECT AND INTERCEPT HILD PORNOGRAPHY.

5. THE UNITED STATES DEPARTMENT OF USTICE SHOULD DIRECT THE LAW NFORCEMENT COORDINATING COMMITTEES

TO FORM TASK FORCES OF DEDICATED AND EXPERIENCED INVESTIGATORS AND PROSECUTORS IN MAJOR REGIONS TO COMBAT CHILD PORNOGRAPHY.

56. THE DEPARTMENT OF JUSTICE OR OTHER APPROPRIATE FEDERAL AGENCY SHOULD INITIATE THE CREATION OF A DATA BASE WHICH WOULD SERVE AS A RESOURCE NETWORK FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO SEND AND OBTAIN INFORMATION REGARDING CHILD PORNOGRAPHY TRAFFICKING.

57. FEDERAL LAW ENFORCEMENT AGENCIES SHOULD DEVELOP AND MAINTAIN CONTINUOUS TRAINING PROGRAMS FOR AGENTS IN TECHNIQUES OF CHILD PORNOGRAPHY INVESTIGATIONS.

58. FEDERAL LAW ENFORCEMENT AGENCIES SHOULD HAVE PERSONNEL TRAINED IN CHILD PORNOGRAPHY INVESTIGATION AND WHEN POSSIBLE THEY SHOULD FORM SPECIALIZED UNITS FOR CHILD SEXUAL

ABUSE AND CHILD PORNOGRAPHY INVESTIGATION.

59. FEDERAL LAW ENFORCEMENT AGENCIES
SHOULD USE SEARCH WARRANTS IN CHILD
PORNOGRAPHY AND RELATED CASES EXPEDITIOUSLY
AS A MEANS OF GATHERING EVIDENCE AND
URTHERING OVERALL INVESTIGATION
FFORTS IN THE CHILD PORNOGRAPHY AREA.

0. FEDERAL LAW ENFORCEMENT AGENTS
HOULD ASK THE CHILD VICTIM IN
EPORTED CHILD SEXUAL ABUSE CASES
F PHOTOGRAPHS OR FILMS WERE MADE OF
IM OR HER DURING THE COURSE OF SEXUAL
BUSE.

. THE DEPARTMENT OF JUSTICE SHOULD
POINT A NATIONAL TASK FORCE TO CONDUCT
STUDY OF CASES THROUGHOUT THE
ITED STATES REFLECTING APPARENT
TTERNS OF MULTI-VICTIM, MULTI-PERPETRATOR
ILD SEXUAL EXPLOITATION.

## RECOMMENDATIONS FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES

. LOCAL LAW ENFORCEMENT AGENCIES

SHOULD PARTICIPATE IN THE LAW ENFORCEMENT COORDINATING COMMITTEES TO FORM REGIONAL TASK FORCES OF DEDICATED AND EXPERIENCED INVESTIGATORS AND PROSECUTORS TO COMBAT CHILD PORNOGRAPHY.

63. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD DEVELOP AND MAINTAIN CONTINUOUS TRAINING PROGRAMS FOR OFFICERS IN IDENTIFICATION, APPREHENSION, AND UNDERCOVER TECHNIQUES OF CHILD PORNOGRAPHY INVESTIGATIONS.

64. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD PARTICIPATE IN A NATIONAL DATA BASE ESTABLISHED TO SERVE AS A CENTER FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO SUBMIT AND RECEIVE INFORMATION REGARDING CHILD PORNOGRAPHY TRAFFICKING.

65. STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD HAVE PERSONNEL TRAINED IN CHILD PORNOGRAPHY INVESTIGATION AND WHEN POSSIBLE THEY SHOULD FORM SPECIALIZED UNITS FOR

ILD SEXUAL ABUSE AND CHILD PORNOGRAPHY
VESTIGATIONS.

STATE AND LOCAL LAW ENFORCEMENT
NCIES SHOULD USE SEARCH WARRANTS
CHILD SEXUAL EXPLOITATION CASES
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FURTHERING OVERALL INVESTIGATION
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STATE AND LOCAL LAW ENFORCEMENT
ICERS SHOULD ASK THE CHILD VICTIM
REPORTED CHILD SEXUAL ABUSE CASES
PHOTOGRAPHS OR FILMS WERE MADE OF
OR HER DURING THE COURSE OF SEXUAL
E.

RECOMMENDATIONS FOR PROSECUTORS

THE UNITED STATES DEPARTMENT OF
ICE SHOULD DIRECT UNITED STATES
RNEYS TO PARTICIPATE IN LAW
RCEMENT COORDINATING COMMITTEE
FORCES TO COMBAT CHILD
OGRAPHY.

69. FEDERAL, STATE, AND LOCAL PROSECUTORS SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

70. PROSECUTORS SHOULD ASSIST STATE, LOCAL, AND FEDERAL LAW ENFORCEMENT AGENCIES TO USE SEARCH WARRANTS IN POTENTIAL CHILD PORNOGRAPHY AND RELATED CHILD SEXUAL ABUSE CASES.

71. STATE, LOCAL, AND FEDERAL PROSECUTORS SHOULD ASK THE CHILD VICTIM IN REPORTED CHILD SEXUAL ABUSE CASES IF PHOTOGRAPHS OR FILMS WERE MADE OF HIM OR HER DURING THE COURSE OF SEXUAL ABUSE.

72. STATE AND LOCAL PROSECUTORS SHOULD USE THE VERTICAL PROSECUTION MODEL IN CHILD PORNOGRAPHY AND RELATED CASES.

## F. RECOMMENDATIONS FOR THE JUDICIARY AND CORRECTIONAL FACILITI

73. JUDGES AND PROBATION OFFICERS SHOULD RECEIVE SPECIFIC EDUCATION SO THEY MAY INVESTIGATE, EVALUATE, SENTENCE AND SUPERVISE PERSONS CONVICTED OF CHILD PORNOGRAPHY AND RELATED CASES APPROPRIATELY.

74. JUDGES SHOULD IMPOSE APPROPRIATE PERIODS OF INCARCERATION FOR CONVICTED CHILD PORNOGRAPHERS AND RELATED OFFENDERS.

75. JUDGES SHOULD USE, WHEN APPROPRIATE, A SENTENCE OF LIFETIME PROBATION FOR CONVICTED CHILD PORNOGRAPHERS.

76. PRE-SENTENCE REPORTS CONCERNING NDIVIDUALS FOUND GUILTY OF VIOLATIONS F CHILD PORNOGRAPHY OR RELATED AWS SHOULD BE BASED ON SOURCES F INFORMATION IN ADDITION TO THE FFENDER HIMSELF OR HERSELF.

7. STATE AND FEDERAL CORRECTIONAL ACILITIES SHOULD RECOGNIZE THE

UNIQUE PROBLEMS OF CHILD PORNOGRAPHERS AND RELATED OFFENDERS AND DESIGNATE APPROPRIATE PROGRAMS REGARDING THEIR INCARCERATION.

78. FEDERAL, STATE, AND LOCAL JUDGES SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

## G. RECOMMENDATIONS FOR PUBLIC AND PRIVATE SOCIAL SERVICE AGENCIES

79. PUBLIC AND PRIVATE SOCIAL SERVICE AGENCIES SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

80. SOCIAL, MENTAL HEALTH AND MEDICAL SERVICES SHOULD BE PROVIDED FOR CHILD

PORNOGRAPHY VICTIMS.

81. LOCAL AGENCIES SHOULD ALLOCATE VICTIMS OF CRIMES FUNDS TO PROVIDE MONIES FOR PSYCHIATRIC EVALUATION AND TREATMENT AND MEDICAL TREATMENT OF CHILD PORNOGRAPHY VICTIMS AND THEIR FAMILIES.

82. CLINICAL EVALUATORS SHOULD BE TRAINED TO ASSIST CHILDREN VICTIMIZED THROUGH THE PRODUCTION AND USE OF CHILD PORNOGRAPHY MORE EFFECTIVELY AND TO BETTER UNDERSTAND ADULT PSYCHOSEXUAL DISORDERS.

83. BEHAVIORAL SCIENTISTS SHOULD CONDUCT RESEARCH TO DETERMINE THE EFFECTS OF THE PRODUCTION OF CHILD PORNOGRAPHY AND THE RELATED VICTIMIZATION ON CHILDREN.

84. STATES SHOULD SUPPORT AGE APPROPRIATE EDUCATION AND PREVENTION PROGRAMS FOR PARENTS, TEACHERS AND CHILDREN WITHIN PUBLIC AND PRIVATE SCHOOL SYSTEMS TO PROTECT CHILDREN

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FROM VICTIMIZATION BY CHILD PORNOGRAPHERS AND CHILD SEXUAL ABUSERS.

85. A MULTI-MEDIA EDUCATIONAL CAMPAIGN SHOULD BE DEVELOPED WHICH INCREASES FAMILY AND COMMUNITY AWARENESS REGARDING CHILD SEXUAL EXPLOITATION THROUGH THE PRODUCTION AND USE OF CHILD PORNOGRAPHY.

## III. VICTIMIZATION

86. STATE, COUNTY AND MUNICIPAL GOVERNMENTS SHOULD FACILITATE THE DEVELOPMENT OF PUBLIC AND PRIVATE RESOURCES FOR PERSONS WHO ARE CURRENTLY INVOLVED IN THE PRODUCTION OR CONSUMPTION OF PORNOGRAPHY AND WISH TO DISCONTINUE THIS INVOLVEMENT AND FOR THOSE WHO SUFFER MENTAL, PHYSICAL, EDUCATIONAL, OR EMPLOYMENT DISABILITIES AS A RESULT OF EXPOSURE OR PARTICIPATION IN THE PRODUCTION OF PORNOGRAPHY.

## IV. CIVIL RIGHTS

87. LEGISLATURES SHOULD CONDUCT HEARINGS AND CONSIDER LEGISLATION RECOGNIZING A CIVIL REMEDY FOR HARMS ATTRIBUTABLE TO PORNOGRAPHY.

## V. "ADULTS ONLY" PORNOGRAPHIC OUTLETS

88. "ADULTS ONLY" PORNOGRAPHIC OUTLET PEEP SHOW FACILITIES WHICH PROVIDE INDIVIDUAL BOOTHS FOR VIEWING SHOULD NOT BE EQUIPPED WITH DOORS. THE OCCUPANT OF THE BOOTH SHOULD BE CLEARLY VISIBLE TO ELIMINATE A HAVEN FOR SEXUAL ACTIVITY.

39. HOLES ENABLING INTERBOOTH SEXUAL CONTACT BETWEEN PATRONS SHOULD BE PROHIBITED IN THE PEEP SHOW BOOTHS.

0. BECAUSE OF THE APPARENT HEALTH AZARDS POSED BY THE OUTLET ENVIRONMENT ENERALLY, AND THE PEEP SHOW BOOTH N PARTICULAR, SUCH FACILITIES SHOULD E SUBJECT TO PERIODIC INSPECTION

AND LICENSING BY APPROPRIATE GOVERNMENTAL AGENTS.

91. ANY FORM OF INDECENT ACT BY OR AMONG "ADULTS ONLY" PORNOGRAPHIC OUTLET PATRONS SHOULD BE UNLAWFUL.

92. ACCESS TO "ADULTS ONLY" PORNOGRAPHIC OUTLETS SHOULD BE LIMITED TO PERSONS OVER THE AGE OF EIGHTEEN.

# Chapter 2

## Recommendations For The Justice System And Law Enforcement Agencies

### Introduction

The effective enforcement of obscenity laws necessarily involves a concerted and responsive effort on the part of each facet of the criminal justice system. Personnel involved in each of these components must exhibit some concern and appreciation for its effect of obscene materials on a community. It is unrealistic to expect law enforcement agencies to devote the same attention to obscenity law violations that violent crimes command. This does not imply, however, that obscenity violations should be accorded the lowest priority, as it appears they are in many jurisdictions today. In order to control the flow of materials falling within the legal definition of obscenity, law enforcement officials must develop a reputation for initiating prosecution when violations are detected. Absent such enforcement policy, there is little incentive to observe existing obscenity laws. The consequences of a policy of inaction are compounded by the lucrative nature of obscenity trafficking.

The product of a successful investigation and vigorous prosecution is rendered virtually worthless if courts fail to appreciate the community significance of obscenity cases.

Deterrence should be a significant factor in fashioning an appropriate sentence in these types of cases. Only public awareness of firm but fair sentencing practices in obscenity cases can foster an environment conducive to controlling the flow of these materials.

An observation common to much of the testimony heard by the Commission is that there has a gradual relaxation over the last twenty years in the enforcement of obscenity laws. This trend is undoubtedly attributable to a number of factors, but its most conspicuous symptom was a dramatic loss of prosecutor interest in these cases. This dampened enthusiasm appears not to have been occasioned by any change in principle or philosophy, but instead was spawned by the judicial creation of insurmountable legal obstacles. In *Memoirs v. Massachusetts*,[82] the United States Supreme Court enunciated the requirement that material must be "utterly without redeeming social value to be obscene.[83] This additional element of proof marked a significant departure from the pre-existing standard of proof. Prosecutors almost uniformly found this burden to be virtually impossible to satisfy[84] and as a consequence de-emphasized the regulation of obscene material.

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[82] 383 U.S. 413(1966).

[83] *Id*. at 419.

[84] Chicago Hearing, Vol. I, Paul McGeady, p. 81; *See also*, *Miller v. California*, 413 U.S., 15,22(1973).

Seven years later, in Miller v. California,[85] the Supreme Court refashioned the "social value" element of the obscenity standard and considerably eased the prosecution's burden of proof. However, according to a 1977 survey of prosecutors, the Miller standard neither increased the number of obscenity prosecutions nor the conviction rate nationally.[86] The number of jurisdictions actually prosecuting obscenity violations declined while obscene materials became more readily available.[87] It is therefore reasonable to conclude that Memoirs v. Massachusetts was only one of a number of factors contributing to the decrease in obscenity prosecutions.

Since 1973, however, the nature and extent of pornography in the United States has changed dramatically. The materials that are available today are more sexually explicit and portray more violence than those available before 1970. The production, distribution and sale of pornography has become a large, well-organized and highly profitable industry.[88] The growth of the pornography industry has been facilitated in large measure by inadequate law enforcement and prosecutorial resources in this area, and the meting out of minimal punishment to those who have been convicted of violating the obscenity laws. This relaxation of public policy has been further ingrained by the absence of any firm expression of citizen concern.

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[85] 413 U.S. 15(1973).

[86] An Empirical Inquiry Into the Effects of Miller v. California on the Control of Obscenity, 52 N.Y.U. L. Rev. 810, 928(1977).

[87] Id.

[88] See, the discussions of Production, Distribution and Technology of Sexually Explicit Materials found in Part Four of this Report.

All individuals and agencies responsible for vice enforcement must be committed to giving obscenity violations adequate priority. As with any law enforcement objective, the agencies must use various criteria in determining the degree of attention the problem merits. This process requires an evaluation of the scope of the problem, the cost to the locality both in safety and economic terms and the public demand for increased enforcement efforts. The enforcement of obscenity laws must obviously be balanced against other law enforcement priorities. In some instances, this evaluation may result in a temporary realignment in enforcement attention, but most agencies will be able to effectively increase obscenity enforcement without substantially detracting from other areas of responsibility for significant periods of time.[89] Once a reputation for community intolerance is developed, official need only perform periodic inspections.

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[89] One witness before the Commission acknowledged the possibility of a decrease in enforcement efforts in certain areas of obscenity enforcement was given greater emphasis. "I think there is a great deal of time spent on thefts, minor thefts; and yes, they are important. But I think that obscenity has more far-reaching effects on our culture and is important." Miami Hearing, Vol. II, Barbara Hattemer, p. 96.

The law enforcement community should recognize fully the magnitude of this multi-faceted problem and bring into focus the means necessary to curtail it. Law enforcement agencies must examine the nature of the pornography industry within their respective jurisdictions and take steps to address the situation. Federal, state and local agencies need adequate manpower and the expertise of qualified investigators to conduct thorough investigations of obscenity law violations, especially those involving large scale pornography operations. The use of forfeiture laws to disgorge illicit profits is a potent prosecutorial tool.

The United States Department of Justice should provide the leadership for a coordinated law enforcement effort through the mandate of its highest ranking officials and its ninety-four United States Attorneys. The Justice Department is able to provide valuable training and assistance to state and local prosecutors and law enforcement officials. The policies and practices of the Department of Justice should lend impetus to a national reassessment of the prioritization of obscenity enforcement.

Congress and the state legislatures must examine existing laws and enact the necessary changes to create an effective and precise means of addressing the expansive scope of the obscenity and pornography problem today.

Finally, when an individual is convicted of an obscenity violation the sentencing judge must have accurate and comprehensive information about the defendant and the underlying offense. Courts must impose sentences which are appropriate to the dimensions and community impact of obscenity violations. Courts should be mindful of the deterrent effect that a sentence must serve to counterbalance the financial incentive to continue the distribution of these materials.

The recommendations that follow attempt to accomplish the foregoing objectives.

Once an individual is charged with an obscenity violation, a United States Attorney or local district attorney should prosecute aggressively if the investigation and bringing of charges are to have any effect. This includes enforcing the existing laws and fully using other remedies particularly those laws providing forfeitures that could literally put many pornographers out of business.

The United States Department of Justice must provide the leadership for the overall law enforcement effort through the work of its highest ranking officials and its ninety-four United States Attorneys. The Justice Department is able to provide valuable training and assistance to state and local prosecutors and local police departments. Moreover it can provide some of the impetus for legislative changes.

Congress and the state legislatures must examine existing laws and enact the necessary changes to create an effective and precise means of addressing the expansive scope of the obscenity and pornography problem today.

Finally, when an individual is brought before the court and is convicted, the sentencing judge must have accurate and comprehensive information about the offender and the offense. The courts must impose sentences with the maximum deterrent effect and cease imposing sentences which merely increase the pornographer's cost of doing business.

The recommendations which follow attempt to accomplish these objectives.

## A. RECOMMENDATIONS FOR CHANGES IN FEDERAL LAW

### RECOMMENDATION 1:

CONGRESS SHOULD ENACT A FORFEITURE STATUTE TO REACH THE PROCEEDS AND INSTRUMENTS OF ANY OFFENSE COMMITTED UNDER THE FEDERAL OBSCENITY LAWS.

The addition of civil and criminal forfeiture provisions to the existing federal obscenity laws[90] would greatly enhance their deterrent effect. In addition to the penalties already prescribed by statute, a defendant would be subject to forfeiture of any profits derived from or property used in committing the offense. The Child Protection Act of 198491 presently contains such forfeiture provisions pertaining to offenses involving child pornography.[92]

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[90] See, 18 U.S.C. SS1461-1465 (1985).

[91] 18 U.S.C.A. S2251 (West Supp. 1982).

The addition of forfeiture provisions in the federal obscenity statutes would have a profound effect on some of the most egregious offenders, especially those who are members of, associated with, or are influenced or controlled by, organized crime families. The forfeiture provision would affect those who profit by their illegal activity and who have created criminal enterprises large enough to own or lease real estate, fleets of motor vehicles, or other valuable assets. The loss of such valuable property would have a more significant deterrent effect than the mere imposition of a fine or modest period of incarceration which the offender may see as merely another "cost of doing business."[93] Forfeiture provisions would also aid law enforcement efforts by providing the government with property to be used in future undercover operations and perhaps even provide sufficient assets to reimburse a significant portion of investigative and prosecution costs.

According to the federal prosecutor in a series of Miami, Florida, obscenity cases commonly known as MIPORN where many of the defendants had tremendous assets scattered throughout the United States, forfeitures would have made a tremendous contribution toward underwriting the costs of the government investigation.[94]

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[92] See, Recommendations for the Regulation of Child Pornography, infra.

[93] The precise items subject to forfeiture should be determined by Congress with any Constitutional limitations clearly recognized.

Under current law even large scale and well-organized distributors of obscene material that have been repeatedly convicted retain their massive profits which they often use to finance other unlawful activity.[95] It is estimated that the film "Deep Throat" cost $25,000 to produce and has made profits of $50,000,000,[96] and few or none of these proceeds were paid to the "star" of the film, Linda Lovelace (now Marchiano) or others involved in the actual production.[97] The film's profits were used allegedly by the Perainos, reported members of the Columbo organized crime family,[98] to develop Bryanston Films of Hollywood, which distributed the horror film, "The Texas Chainsaw Massacre,"[99] to purchase yachts, airplanes, islands and property in the Bahamas, and as seed money for drug smuggling activities.[100]

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[94] "MIPORN was a two and a half year undercover investigation into organized crime's influence in the pornography industry." New York Hearing, Vol. II, Marcella Cohen, p. 41; MIPORN is further discussed in Appendix One to the Organized Crime Chapter.

[95] New York Hearing, Vol. I, Christopher J. Mega, pp. 166-67.

[96] New York Hearing, Vol. I, William Kelly, p. 71.

[97] New York Hearing, Vol. I, Linda Marchiano, p. 63.

[98] Louis, Joseph and Anthony Peraino are reported members or associates of the Columbo organized crime family, See, The discussion of Organized Crime for further information.

[99] New York Hearing, Vol. I, William Kelly, p. 74.

In recognition of the need to seize substantial profits gained through unlawful activity and to prevent their use in other crimes, Congress has authorized forfeiture for other crimes.[101] Any new legislation should be drafted and

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[100] New Hearing, Vol. I, Christopher J. Mega, p. 162; See also, Cong Rec. S433 (daily ed. Jan. 30, 1984) (Statement of Sen. Jesse Helms).

[101] See e.g., 21 U.S.C. S881(a)(1).
((a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2).

(5) All books, records and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all money, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title

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and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.);

18 U.S.C. S492. (All counterfeits of any coins or obligations or other securities of the United States or of any foreign government, or any articles, devices, and other things made, possessed, or used in violation of this chapter or of sections 331-333, 335, 336, 642 or 1720, of this title, or any material or apparatus used or fitted or intended to be used, in the making of such counterfeits, articles, devices or things, found in the possession of any person without authority from the Secretary of the Treasury or other proper officer, shall be forfeited to the United States);

18 U.S.C. S924 ((d) Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulaged thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provision of the Internal Revenue Code of 1954 relation to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall so far as applicable, extend to seizures and forfeiture under the provision of this chapter);

18 U.S.C. S1955. (illegal gambling businesses; (d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relation to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply

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seizures and forfeitures incurred or alleged to have been incurred under the provisions of his section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General).

18 U.S.C.A. S1963 (West Supp. 1985). ((a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years or both, and shall forfeit to the United States, irrespective of any provision of State law --

(1) any interest the person has acquired or maintained in violation of Section 1962;

(2) any --

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profit or other proceeds.

(b) Property subject to criminal forfeiture under this section includes --

(1) real property including things growing on, affixed to, and found in land, and

(2) tangible and intangible personal property, including rights, privileges,

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interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section);

18 U.S.C. S2318. (counterfeit labels; (d) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed);

18 U.S.C. S2344. (c) Any contraband cigarettes involved in any violation of the provision of this chapter shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating of the seizure, forfeiture, and disposition of firearms, and defined in section 5845(a) of such Code, shall , so far as applicable, extend to seizures and forfeitures under the provisions of this chapter); and

18 U.S.C. S2513. (Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 of section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) at the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeding from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation top informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and

implemented in a manner similar to other present federal laws to insure due process of law to all parties in interest.[102]

The only present authority to permit the forfeiture of profits and instruments derived from the distribution of obscene materials is RICO. Through 1985 no federal RICO cases have been brought to forfeit profits or instruments used in or derived from obscenity law violations.103 The RICO statute is currently is inadequate to reach the profits and instruments without establishing and relying on proof of two or more of predicate offenses. The proposed legislation would allow forfeiture in the many cases where RICO cannot appropriately be used.

RECOMMENDATION 2:

CONGRESS SHOULD AMEND THE FEDERAL OBSCENITY LAWS TO ELIMINATE THE NECESSITY OF PROVING TRANSPORTATION IN INTERSTATE COMMERCE. A STATUTE SHOULD BE ENACTED TO ONLY REQUIRE PROOF

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> not inconsistent with the provision of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs law contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents or other persons as may be authorized or designated for that purpose by the Attorney General.)

[102] See also, The discussion in this Chapter of Recommendations for Changes in State Law, infra.

[103] See, Recommendations For State and Local Law Enforcement Agencies, infra, for further discussion.

THAT THE DISTRIBUTION OF THE OBSCENE MATERIAL "AFFECTS" INTERSTATE COMMERCE.

DISCUSSION

Pursuant to provisions of 18 U.S.C. S1462 and 18 U.S.C. S1465 the United States is required to prove that the particular obscene material in question actually was transported in interstate commerce at a particular specified time and to and from particular and specified locations.[104]

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[104] 18 U.S.C. S1462 (1982) provides, in part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses an express company or other common carrier, for carriage in interstate or foreign commerce -
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
>
> (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or
>
> (c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; * * *;"

18 U.S.C. S1465 provides, in part:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or

This has become an increasingly insurmountable burden for federal prosecutors to meet in obscenity cases. Distributors of obscenity, especially those associated with or members of organized crime families, frequently avoid the mails and common carriers when they ship their wares. With the assistance of their attorneys such persons and organizations have developed intricate schemes of operation to prevent proof of this necessary element of the present statute.[105] They use their own trucks and sometimes make several stops or simulated deliveries or pickups along the way.[106] This process thwarts extremely expensive and time consuming surveillance by law enforcement officers and makes it virtually impossible to detect which items in a particular shipment actually crossed state lines.

The proposed amendment should take the form of an additional section of Title 18. Such sections should supplement existing sections 1462 and 1465 and include language which prohibits activities that "affect" commerce. The addition of such a statute would facilitate prosecutions

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> filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other articles capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[105] Los Angeles Hearing, Vol. I, Kenneth Gillingham, p. 114-6.

[106] Id.

while maintaining the integrity of the present statutory structure. In a multiple count indictment, charges could be brought against individuals under both sections, subject to constitutional limitations which exist in any such case. Legislation which creates a separate violation would prevent the effects of the inevitable and lengthy initial constitutional challenges to such new legislation from crippling or stopping all federal prosecutions.

A requirement that the prosecution prove the transaction "affects" commerce is a more realistic burden of proof which would close the technical loopholes these criminals have so successfully exploited. This requirement would be consistent with other federal statutes such as the Hobbs Act and the firearms laws.[107] An examination of the constitutional ramifications discloses no barrier to this proposed amendment.[108]

Article I, Section 8 of the United States Constitution empowers Congress to regulate commerce.[109] The interpretation and application of the constitutional limits on Congress' power to regulate has been the issue in many cases whose factual bases are widely divergent. The subject of regulation, whether it is production, distribution or consumption, is constitutionally immaterial so long as the activity in question is within the sphere of Congress' regulatory powers.[110] The underlying principles, however, have been applied consistently to a variety of factual situations. The particular subject matter of the statute should not present a barrier to a constitutionally valid amendment.

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[107] See, e.g., 18 U.S.C. SS844, 1951 and 1202.

[108] See, Wickard v. Filburn, 317 U.S. 111(1942).

[109] "Section 8. [1] [The Congress shall have Power] [3] to regulate the Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, S8, cl.3.

The distinction between regulating activities "in commerce" and regulating those which "affect commerce" is a valid one and has been maintained. The standards, however, have been recognized by the courts as being within the total ambit of Congress' constitutional regulatory powers.[111] The decision as to the scope of regulatory jurisdiction lies with Congress and is generally made as a matter of public policy rather than a decision dependent purely on legal considerations.

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[110] *See*, *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). More recent cases indicate the validity of the Court's earlier decisions and the ultimate expanse of Congress' power to regulate. These cases represent a variety of legal and factual issues, but each one affirms the underlying principals of the preceding cases. *See, e.g.*, *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974); *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975); *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232(1978); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d. 813 (9th Cir. 1982).

[111] *See*, *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 241(1979). "The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities in interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect interstate commerce*." (emphasis added).

If the activity is other than purely local in nature it is subject to federal commerce power regulation. It is within this constitutional grant that Congress may exercise discretion in setting the limits of jurisdiction. Since Congress has already Constitutionally chosen to regulate the activity through 18 U.S.C. SS1462 and S1465, it may, if it chooses, expand the regulatory jurisdiction to include activities which "affect" commerce as well as those "in" commerce.

This Commission finds that virtually all distribution of obscene material substantially affects interstate commerce.

Department of Justice Guidelines now in effect for the United States Attorneys preclude federal prosecution of obscenity cases that properly belong in state courts.[112]

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[112] The guidelines provide, "The Federal role in prosecuting obscenity cases is to focus upon the major producers and interstate distributors of pornography while leaving to local jurisdiction the responsibility of dealing with local exhibitions and sales. This role has not met with complete acceptance and understanding by citizens of communities confronted with offensive matters who find their local prosecutor ineffectual in this area. Even so, local prosecutors have been regarded as having the primary obligation to deal with such material on a local level.

* * *

Local prosecutors, however willing to prosecute, frequently experience difficulty because of several factors, notably a lack of expertise in the field, lack of support by the community and/or its officials, and lack of necessary funds. In these circumstances the United States may provide assistance through prosecutive efforts not falling precisely within the above guidelines. Conversely, local authorities dealing with obscene material being distributed within their area may develop evidence of interstate distribution useful to a Federal prosecution. Communications between Federal and

Existing guidelines require the United States Attorneys to give higher priority to cases involving large scale distributors who realize substantial income from multi-state operations and cases in which there is evidence of involvement by known organized crime figures.[113] These are the types of cases that require the operational resources of the Department of Justice and federal law enforcement agencies and are accordingly beyond the scope of local law enforcement capabilities.[114] The new section would be a substantial aid to federal prosecutors' efforts, but properly applied it would not result in any more federal encroachment on state prosecutors' prerogatives than present federal law permits.

RECOMMENDATION 3:

CONGRESS SHOULD ENACT LEGISLATION MAKING IT AN UNFAIR BUSINESS PRACTICE AND AN UNFAIR LABOR PRACTICE FOR ANY EMPLOYER TO HIRE INDIVIDUALS TO PARTICIPATE IN COMMERCIAL SEXUAL PERFORMANCES.

DISCUSSION

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local prosecutors, and coordination of efforts in such instances, can be highly productive in both Federal and local efforts." United States Department of Justice, United States Attorneys' Manual, Ch. 75, p. 9a (June 18, 1981).

[113] Chicago Hearing, Vol. II, James S. Reynolds, p. 263.

[114] New York Hearing, Vol. II, William Johnson, p. 82.

This Commission does not advocate nor does it condone the use of individuals in commercial sexual practices. The Commission strongly supports enforcement of existing criminal laws against those who violate them by using individuals in commercial sexual performances or in the production of obscene materials. The Commission does, however, recommend imposing fair labor standards on those businesses which engage individuals to perform sexual acts for commercial purposes. This recommendation is made only out of an abiding concern for those persons used in these sexual performances.

The production of obscene material, like many forms of criminal activity, is an enterprise patterned after other legitimate business structures.[115] Producers of obscene material make capital investments, hire employees, and earn sizeable profits. Unlike other businesses, the regulations governing the production of obscenity are largely self-imposed or non-existent. This industry has been called the "last vestige of true laissez-faire capitalism" in the United States.[116] Unlike more conventional businesses and industries, profits from obscene materials go largely untaxed and their employees often suffer varying degrees of mental and physical injury.117 Seldom, if ever, do employees maintain insurance, pay benefits or provide pension plans to performers or others who work for them.

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[115] Chicago Hearing, Vol. II, Duncan McDonald, p. 59.

[116] *Id*. at 61; The value of society's goods always erives from the values of its people. A democratic society hat is unwilling to bar *Hustler* on public newsstands or ban illboards from beautiful views cannot justly blame apitalism for these offenses. It is up to the political, udicial, and religious institutions of the society, not ther businesses, to eliminate such opportunities for ugly rofit. Capitalists perform a vital role in determining what oods and services are initially offered to the public. But he people and their government determine the limits of what an be marketed. Markets provide the ultimate democracy;

Congress should enact legislation, as necessary, that would specifically subject the production of obscene materials to the same types of laws and regulations as other businesses. This would not necessarily involve criminal statutes or penalties, but rather it could take the form of civil regulatory statutes. These are not recommended as exclusive remedies, but as a form of regulation that parallels other existing forms of criminal and civil relief. The basis for these statutes is the government's broad powers to regulate commerce.

Legislation also should be enacted that would make it an unfair business practice and an unfair labor practice to hire individuals to participate in certain sexual performances for purposes of producing sexually explicit materials. Included in the prohibited activities should be sexual performances involving children violence sado-masochism, or anything which would meet the description of unlawful sexually explicit depictions developed in such

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democracy, though, defines the marketplace. G. Gilder, The Spirit of Enterprise, 91(1984).

117 See, The discussion of performers in the pornography industry for further information.

ederal law.

Congress should prohibit the sale and distribution of ny product made as a result of those unfair practices and rovide a civil cause of action for any party injured as a esult of these practices.[118] The law should also provide rotection for individuals who are used as actors or models n obscene material. Such legislation should make any ontracts for prohibited performances void, and provide a ormula for the determination of damages and payment of ttorneys fees. Existing laws and regulations prohibit an mployer from imposing dangerous, unhealthy,or unfair onditions of employment on an employee. Employees have a emedy if they are harmed in the course of their mployment. None of these requirements have been applied to he pornography industry where these risks are truly ervasive. It is essential that the commercial laws and egulations be applied in a fair and even-handed manner. usiness enterprises should be prevented from operating in a anner which jeopardizes the welfare of its employees.

ECOMMENDATION 4:

ONGRESS SHOULD AMEND THE MANN ACT TO MAKE ITS PROVISIONS ENDER NEUTRAL.

ISCUSSION

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[118] This could be in the form of a civil rights type pproach.

The Mann Act[119] makes it a federal offense to transport "any woman or girl" in interstate or foreign commerce for the purpose of "prostitution or debauchery, or for any other immoral purpose, or with intent and purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to immoral practice debauchery or to engage in any other immoral practice."[120] Men and boys who are used in prostitution and in the production of obscene materials are often transported in commerce for the very purposes proscribed in the present statute.[121] Those who exploit men and boys for illegal and immoral purposes should be subject to the same punishment as those who exploit females.

The proposed amendment would simply afford protection to a class of persons who are without adequate legal redress. While women and girls may continue to comprise the majority of such cases of exploitation these statistics should provide no excuse to exclude men and boys from equal protection purely on the basis of the smaller number of reported cases.[122]

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[119] 18 U.S.C. S2421 (1985).

[120] Id.

[121] See, Comm. v. Richard Kind, C-19168; Comm. v. Theodore Dufresne, C-19608; and Comm. v. Alfredo Martin, C-19568 Circuit Court of Arlington County, Virginia.

Further, the Act should be amended to prohibit illegal acts rather than the current prohibition against immoral acts. This amendment would address and alleviate the concerns of those who suggest an overzealous prosecutor may use the Act to harass individuals engaged in lawful consensual sexual activity. This amendment would not expand the scope of enforcement or prosecution and it should set clear guidelines for the types of activities that are proscribed.

RECOMMENDATION 5:

CONGRESS SHOULD AMEND TITLE 18 OF THE UNITED STATES CODE TO SPECIFICALLY PROSCRIBE OBSCENE CABLE AND SATELLITE TELEVISION PROGRAMMING.

DISCUSSION

The United States Code proscribes the utterance of "any obscene, indecent or profane language by means of radio communication."[123] Because cable and satellite television programming is not conveyed by any means interpreted by the

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[122] ". . . statistically there appears to be no particular preference on the part of the child molesters for victim. It's about 50 percent of the time boys and 50 percent of the time they are girls. So clearly boys ought to be included under the Mann Act." Washington, D.C., Hearing, Vol. I, Senator Mitch McConnell, p. 56.

[123] 18 U.S.C. S1464.

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courts to be a radio communication, any obscene programming is not covered by the prohibitions of the present statute.

The Cable Communications Policy Act of 1984 attempts to provide another avenue for the prosecution of obscenity shown over cable television.124 The Act, provides:

> Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both.[125]

The provisions of this section may be in conflict with two other sections of the act governing editorial control of programming by cable operators. Section 531(e) of Title 47 provides that:

> Subject to Section 544(d) of this title, a cable operator shall not exercise any editorial control over any public,educational or governmental use of channel capacity provided pursuant to this section.

In addition, section 544(d) provides, in part:

> (1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.
> (2) (A) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during period selected by that subscriber.

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124 47 U.S.C. S559.

125 Id.

Section 544 (d) seems to contemplate allowing the operator to provide obscene programming while Section 559 makes it a crime to do so. The apparent conflict should be resolved and legislation should provide clear guidance for cable operations, federal prosecutors and law enforcement officers.[126]

RECOMMENDATION 6:

CONGRESS SHOULD ENACT LEGISLATION TO PROHIBIT THE

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[126] Senate Bill 1090 sponsored by Senator Jesse Helms (R-NC) would place a specific prohibition against obscene cable programming by amending Section 1464 of Title 18 of the United States Code. The Helms Bill provides in part:

1464. Distributing obscene material by radio or television.

"(a) Whoever utters any obscene, indecent, or profane language, or distributes any obscene, indecent, or profane material, by means of radio or television, including cable television, shall be fined not more than $50,000 or imprisoned not more than two years, or both."

"(b) As used in this section, the term "distributes" means to send, transmit, retransmit, telecast, broadcast, or cable-cast, including by wire or satellite, or produce or provide such material for distribution."

The standard language of Title 18 provides several synonyms for the word "obscene". 18 U.S.C. S1461 provides, "Every obscene, lewd, lascivious, indecent, filthy or vile . . . "

Enactment of legislation of this type would enable United States Attorneys to prosecute violators under the criminal code and alleviate the possible conflict under the Cable Communications Policy Act.

## TRANSMISSION OF OBSCENE MATERIAL THROUGH THE TELEPHONE OR SIMILAR COMMON CARRIER.

DISCUSSION:

This Commission has received substantial evidence of the use of the telephone to transmit obscene material.[127] Dial-A-Porn services offer the caller the opportunity to participate in obscene telephone conversations or to receive obscene messages.[128]

Two years ago, the Congress enacted legislation amending section 223 of the Communications Act of 1934.[129] This enactment prohibited the use of the telephone to make obscene or indecent communications for commercial purposes to anyone under eighteen years of age except where in compliance with regulations issued by the Federal Communications Commission.[130] The FCC promulgated regulations making it an exception for the provider of a recorded message if the message was made available only between the hours of 9:00 p.m. and 8:00 a.m. eastern standard time or if the caller ade prepayment by credit card in the case of a "live" essage.[131] Carlin Communications challenged the FCC egulation.

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[127] See, Los Angeles Hearing, Vol. I, William A. Dunkle, p. 248; Los Angeles Hearing, Vol. I, Judith F. Trevillian, p. 263; Los Angeles Hearing, Vol. I, Brent D. Ward, p. 225. The most commercially prolific form of dissemination of pornographic material is through services commonly referred to as "Dial-A-Porn."

[128] See, The discussion of the Dial-A-Porn services available for further information.

[129] See, 47 U.S.C. S223(b)(1).

[130] Id.

On review, the United States Court of Appeals for the econd Circuit found the regulations were invalid.[132] The ourt found that the government had a compelling interest in rotecting minors from salacious material, but that the FCC egulations were not well tailored to meet their objectives, ich could be achieved by less restrictive alternatives.133 dicta, the court said the FCC should have given more rious consideration to other options such as "blocking" and cess codes. Through "blocking" a subscriber can have cess to all "976" numbers blocked from his telephone. cess codes could be issued to subscribers over eighteen who uld have to dial the code in order to receive the sexually plicit message.[134]

On October 16, 1985, the FCC announced new regulations verning Dial-A-Porn.[135] Under the new regulations, al-A-Porn services must require either an authorized access identification code or they must obtain prepayment by credit card before transmission of a sexually explicit message.[136]

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[131] 49 Fed. Reg. 24, 996(June 4, 1984).

[132] Carlin Communications, Inc. v. FCC, 749 F.2d 113 d Cir. 1984).

[133] Id. at 121.

[134] Id. at 122-23.

[135] 50 Fed.Reg. 42699. (October 22, 1985).

Carlin challenged the new FCC regulations, and on April 11, 1986, the Court of Appeals granted their petition and set aside the regulations as applied to Carlin.137 The Court of Appeals relied on statements from New York Telephone that access or identification codes are not technologically feasible in NYT's network,[138] and found that "the record does not support the FCC's conclusion that the access code requirement is the least restrictive means to regulate Dial-A-Porn . . . ."[139] The Court again referred to "blocking" as a less restrictive means of regulating Dial-A-Porn.140 Blocking devices installed on the telephone customer's own terminal equipment could be used to block access to one or more pre-selected telephone numbers.141 The Court also suggested that the FCC should have considered the feasibility of passing along the cost of customer premises blocking equipment to the providers of Dial-A-Porn and/or the telephone companies.[142]

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[136] Id.

[137] Carlin Communications, Inc. v. FCC, No. 85-4158 (2nd Cir. 1986). The Court noted that "[t]he stay, however, is granted only at the behest of the petitioners here . . . and applies only to Dial-A-Porn service providers on the New York Telephone (NYT) system. (Slip opinion, p. 3).

[138] Id. slip op. at 11 and 19. The Court noted that the access codes are probably technologically possible in most other parts of the country. See, slip op. at 4.

[139] Id. at 23.

[140] Id. at 23-24.

[141] Id. at 6-7.

The latest decision by the Second Circuit leaves the state of the law regarding Dial-A-Porn even more uncertain. The two attempts by the FCC to promulgate regulations in accordance with the federal statute have failed. The Court of Appeals found earlier that limitations on the hours that Dial-A-Porn messages may be offered were not well tailored enough to regulate the problem.143 Now the Court has ruled that access codes are unduly restrictive as applied to Carlin in New York, but may be permissible elsewhere.144 The "blocking" option advanced by the Court has serious practical limitations. Blocking may not be available to all telephone customers.[145] Those who obtain the service would either lose access to all "976" numbers,[146] or have to pre-select which numbers they wanted blocked.[147] Few parents would have sufficient knowledge of the multitude of Dial-A-Porn numbers to be able to pre-select them and prevent their children from calling them by use of a blocking device, and minors would still be free to make the calls from telephones not equipped with blocking devices.

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[142] Id. at 23.

[143] 749 F.2d at 121.

[144] Carlin Communications, Inc. v FCC, supra, slip op. at 3-4.

[145] See, Los Angeles Hearing, Vol. I, William Dunkle, p. 254.

[146] Id.

[147] Carlin Communications, Inc. v. FCC, supra, slip op. at 6.

The provision of the federal statute permitting Dial-A-Porn messages to be provided in accordance with FCC regulations[148] has proven unworkable in addition to providing a "safe harbor" provision for Dial-A-Porn merchants. Congress should enact legislation that simply prohibits the transmission of obscene material through the telephone or similar common carrier.[149]

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[148] 47 U.S.C. S223(8)(2).

[149] In an attempt to address the Dial-A-Porn issue, Senate Bill 1090 has been introduced by Senators Jesse Helms, (R-NC), John East (R-NC) and Jeremiah Denton (R-Ala) to amend Section 223 of the Communications Act of 1934.

The Bill provides:

> Whoever - "(A) in the District of Columbia or in interstate or foreign communications, by means of telephone, makes (directly or by recording device) any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent, regardless of whether the maker of such comments placed the call or" (B) knowingly permits any telephone facility under such person's control to be used by any purpose prohibited by subparagraph (A). Shall be fined not more than $50,000 or imprisoned not more than six months, or both."

Additionally, Rep. Thomas J. Bliley (R-Va) has introduced H.R.4439 which would amend section 223 of the Communications Act and eliminate the provision requiring the FCC to issue regulations.

> H.R. 4439
>
> A bill to amend the Communications Act of 1934 to restrict the making of obscene and indecent communications by telephone. Be it enacted by the

## B. RECOMMENDATIONS FOR CHANGES IN STATE LAW.

### RECOMMENDATION 7:

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, OBSCENITY STATUTES CONTAINING THE DEFINITIONAL REQUIREMENT THAT MATERIAL BE "UTTERLY WITHOUT REDEEMING SOCIAL VALUE" IN ORDER TO BE OBSCENE TO CONFORM WITH THE CURRENT STANDARD ENUNCIATED BY THE UNITED STATES SUPREME COURT IN *MILLER V. CALIFORNIA*.[150]

### DISCUSSION

A minority of jurisdictions, including the State of

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Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.
This Act may be cited as the "Telephone Decency Act of 1986."

SECTION 2. AMENDMENTS.
Section 223(b) of the Communications Act of 1934 is amended-
(1) in paragraph (1)(A), by striking out "under eighteen years of age or to any person without that person's consent";
(2) by striking out paragraph (2);
(3) in paragraph (4), by striking out "paragraphs (1) and (3)" and inserting in lieu thereof "paragraph (1) and (2)"; and
(4) by redesignating paragraphs (3), (4), and (5) as paragraphs (2), (3), and (4), respectively.

[150] 413 U.S. 15 (1973).

California,[151] retain the requirement that material must be "utterly without redeeming social value" in order to be found obscene.[152]

This standard emanates from the case of *Roth v. United States*, and the later case of *Memoirs v. Massachusetts*’[153] in which a plurality of the Supreme Court held that a book alleged to be obscene cannot be proscribed unless it is found to be utterly without redeeming social value.[154] The court reversed an obscenity conviction involving John Cleland's book *Memoirs of a Woman of Pleasure* because the work possessed a "modicum" of social value.[155] The *Memoirs* test made it almost impossible to convict in obscenity cases.[156] When the Supreme Court decided Miller v. California,[157] a new obscenity test resulted.[158] Although the Court remained divided on basic philosophical grounds, not a single member of the Court voted to retain the Memoirs standard. (emphasis added). Writing for the Court in Miller Chief Justice Warren E. Burger said the standard formulated in Memoirs required proof of a negative, "a burden virtually impossible to discharge under our criminal standards of proof." (emphasis added).[159]

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[151] On April 14, 1986, the Governor of California signed into law Senate Bill 139 which amends the California obscenity law. The new law goes into effect in January of 1987, and defines obscene matter as material which

> taken as a whole, the predominant appeal of which to the average person applying contemporary statewide standards, to a prurient interest, meaning a shameful or morbid interest in nudity, sex, or excretion and is matter which taken as a whole goes substantially beyond customary limits of candor in the description or representation of such matters; and is matter which, taken as a whole *lacks significant literary, artistic, political, educational, or scientific value*. (emphasis added)

The new law still does not contain the exact language of *Miller* and thus its constitutionality may be uncertain until any appeals through the individual system are completed.

[152] 354 U.S. 476 (1957).

[153] 383 U.S. 413 (1966).

[154] 383 U.S. 413 (1966).

[155] *Id.* at 418-20.

The Court also noted that the standard had even been abandoned by Justice William Brennan who authored the Court's opinion in Memoirs. To the extent that the Memoirs standard exists today, it makes prosecution of obscenity cases extremely difficult. To win acquittal on an obscenity charge, a defendant need only demonstrate some miniscule social value as opposed to the serious literary, artistic, political or scientific value required under Miller. The Memoirs standard is still the law in California[160] and has posed a major obstacle to successful obscenity prosecutions.

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[156] See, Miller v. California, 314 U.S. 15 (1973).

[157] Id.

[158] 413 U.S. at 22(1973); See, Chicago Hearing, Vol. I, Paul McGeady, p. 81.

[159] 413 U.S. at 22.

[160] See, supra note 151.

Consequently, the legal problems attendant to prosecution may contribute to factors which the wholesale pornography industry is centered in the Los Angeles area, and produces most of the materials sold in the entire United States. The pornography industry in the area of Los Angeles earns at least $550 million a year[161] and produces eighty percent of the sexually explicit videotapes, eight millimeter films and novelties are produced there.162

The principle of Federalism protects the constitutional prerogative of the states to enact obscenity laws which embody standards less stringent than those approved by the United States Supreme Court in Miller. As Chief Justice Burger wrote in Paris Adult Theatre I v. Slaton[163]

> The States, of course, may follow such a "laissez faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. See, United States v. Reidel, 402 U.S., at 357, 28 L. Ed. 2d 813; Memoirs v. Massachusetts, 383 U.S., at 462. 16 L. Ed. 2d 1(White, J., dissenting). "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions," Griswold v. Connecticut, 381 U.S. 479, 482, 14 L. Ed. 2d 510, 85 S. Ct. 1678(1965). See, Ferguson v. Skrupa, 372 U.S., at 731, 10 L. Ed. 2d 93, 95 ALR 2d 1347(1963); Day-Brite Lighting Inc. v. Missouri,

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[161] Chicago Hearing, Vol. I, Donald Smith, p. 31.

[162] Id. at 30.

[163] 413 U.S. 49 (1973).

342 U.S. 421, 423, 96 L. Ed. 469, 72 S. Ct. 405(1952).[164]

Law enforcement officers in California blame the existing law for severely hampering their effectiveness in eliminating this activity.[165] A Los Angeles Police Department Captain testified, "We have pleaded with the state legislature ever since Miller came into being to adopt it."[166]

If states sincerely wish to provide an effective basis for law enforcement this change in standards is essential.

RECOMMENDATION 8:

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, OBSCENITY STATUTES TO ELIMINATE MISDEMEANOR STATUS FOR SECOND OFFENSES AND MAKE ANY SECOND OFFENSE PUNISHABLE AS A FELONY.

DISCUSSION

State obscenity statutes frequently classify a first conviction as a misdemeanor. In some jurisdictions an obscenity violation becomes a felony when the specific offender is convicted a second time. In other jurisdictions an obscenity violation will remain a misdemeanor regardless of the number of prior convictions. This system results in minimal penalties for many offenders and is no deterrent to large-scale criminal enterprise.

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[164] Id. at 64.

[165] Id. at 46; Los Angeles Hearing, Vol. I, James Docherty, p. 15.

[166] Los Angeles Hearing, Vol. I, James Docherty, p. 15.

State obscenity laws which provide misdemeanor penalties for recidivist offenders produce results which have a minimal deterrent effect. Fines in the amount of thirty to ninety dollars are a common disposition for a first offense in Chicago.[167] Three hundred to five hundred dollar fines are standard in Houston, Texas.[168] In Miami, Florida, a corporation with twenty-five prior obscenity convictions was fined $1,600.[169] In Los Angeles, where the industry earns $550 million a year,[170] a major distributor is often fined no more than $10,000.[171] The amounts of these fines are inconsequential when compared to the profits earned by many produces or sellers of obscene material.[172]

An amendment to state statutes enhancing the penalties for subsequent convictions for obscenity violations would recognize the recidivist nature of the crime and should be directed to management personnel of the wholesale or retail operation. Classifying the crime as a felony would allow judges to impose substantial fines and periods of incarceration for a repeat offender. A conviction for a felony would substantially reduce the incidence of inappropriate sentencing for recidivists.

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[167] Chicago Hearing, Vol. I, Thomas Bohling, p. 16.

[168] Houston Hearing, Vol. II, W.D. Brown, p. 50.

[169] Miami Hearing, Vol. I, Mike Berish, p. 66.

[170] Los Angeles Hearing, Vol. I, Donald Smith, p. 30.

[171] Id. at 46.

[172] See, The discussion of the Production, Distribution and Technology of Sexual Explicit Materials for further information.

RECOMMENDATION 9:

STATE LEGISLATURES SHOULD ENACT, IF NECESSARY, FORFEITURE PROVISIONS AS PART OF THEIR OBSCENITY LAWS.

DISCUSSION

The addition of forfeiture provisions to the state obscenity statutes would greatly enhance their deterrent effect and would be an effective tool for law enforcement officers to use against the most egregious offenders. These forfeiture provisions may mirror such provisions found in several federal statutes. The precise scope of the forfeitures should be the decision of each state legislature and subject to judicial interpretation.

Some states already have taken the initiative in implementing forfeiture provisions in their obscenity laws. The Metropolitan Bureau of Investigation (M.B.I.) in Orlando, Florida, provides an excellent example of the effectiveness of forfeiture provisions under state law. Using the forfeiture provisions of the Florida RICO Act, the M.B.I. obtained forfeitures of $80,000 to $100,000 worth of property in a single investigation and prosecution.[173] The forfeited property included two computer systems, two projection screen televisions and a large assortment of films, magazines, and novelties.[174] Forfeiture should be used to uproot the capital of pornography producers and distributors. Used effectively, forfeiture can substantially handicap these businesses.

RECOMMENDATION 10:

STATE LEGISLATURES SHOULD ENACT A RACKETEER INFLUENCED CORRUPT ORGANIZATIONS (RICO) STATUTE WHICH HAS OBSCENITY AS A PREDICATE ACT.

States which do not have obscenity as a predicate offense for a racketeer influenced corrupt organizations (RICO) violation should consider enacting such legislation. RICO provides an effective means to substantially eliminate obscenity businesses.

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[173] New York Hearing, Vol. II, Larry Schuchman, p. 52.

[174] Id.; See, Recommendations for Changes in Federal Law in this Chapter.

SEE, RECOMMENDATIONS FOR THE UNITED STATES DEPARTMENT OF JUSTICE, INFRA.

## C. RECOMMENDATIONS FOR THE UNITED STATES DEPARTMENT OF JUSTICE

### RECOMMENDATION 11:

THE ATTORNEY GENERAL SHOULD DIRECT THE UNITED STATES ATTORNEYS TO EXAMINE THE OBSCENITY PROBLEM IN THEIR RESPECTIVE DISTRICTS, IDENTIFY OFFENDERS, INITIATE INVESTIGATIONS, AND BEGIN PROSECUTING THEM WITHOUT DELAY.

If the flow of obscene material is going to be resolved through criminal prosecution, the Attorney General of the United States must take a significant, ongoing and personal role in directing a combined federal, state and local effort.

The Attorney General should direct the United States Attorneys to identify the major sources of obscene material within their districts and commence prosecutions without further delay. The United States Attorneys should contact their state and local counterparts and identify persons and organizations responsible for manufacturing and distributing obscene material in their districts. The Attorney General must also follow up on his directives and ensure compliance by the United States Attorneys.

The United States Department of Justice, through guidelines contained in the United States Attorneys' Manual, places a priority on the prosecution of three types of obscenity cases: those involving large scale distributors who realize substantial incomes from multi-state operations; those where there is evidence of involvement by known organized crime figures; and those involving child pornography.[175] United States Attorneys may also increase the priority for cases involving highly offensive material or cases where obscenity is found to be a particular problem in the jurisdiction.[176]

Former Attorney General William French Smith and Assistant Attorney General Stephen S. Trott have urged the United States Attorneys to follow existing departmental guidelines and to prosecute obscenity cases aggressively. On October 4, 1982, Attorney General Smith sent a memorandum to all United States Attorneys calling attention to the guidelines and encouraging aggressive and proactive prosecution of obscenity cases.[177] Attorney General Smith also suggested using the Law Enforcement Coordinating Committees to determine the nature and extent of the obscenity problem in the individual districts.[178] Despite this directive from the Attorney General not a single indictment alleging a violation of federal obscenity laws was returned in 1983 in any district in the United States.[179]

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[175] Department of Justice, United States Attorney Manual (1977).

[176] Id. (This Commission does not believe these are inappropriate.)

[177] Memorandum of Attorney General William French Smith, October 4, 1982. "Proactive prosecution" is a term used to suggest affirmative action taken by law enforcement officers and prosecutors. This term should be contrasted with "reactive prosecution" in which law enforcement officers respond to specific complaints of recently

Assistant Attorney General Trott sent an additional memorandum to the United States Attorneys on August 24, 1983, calling on them to "step up our level of enforcement" of obscenity violations.[180] Assistant Attorney General Trott again called attention to the guidelines and asked the United States Attorneys to set up a meeting with the United States Postal Inspection Service and Federal Bureau of Investigation in their districts to evaluate the need for additional enforcement.[181] He also offered assistance from the Criminal Division of the Department of Justice if an individual United States Attorney needed help in structuring an enforcement

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discovered crimes. Obscenity cases generally cannot be developed without proactive investigative efforts.

[178] Id.

[179] See, infra note 180.

[180] Memorandum of from Stephen S. Trott, Assistant Attorney General, Criminal Division to all United States Attorneys (Aug. 24, 1983) (discussing enforcement of Obscenity Laws).

[181] Id.

program.[182]

This directive has had little effect on most federal prosecutors. The Departmental guidelines have been used as "excuses" to decline prosecution of obscenity cases involving adult material. The guidelines have been perceived as establishing exclusive categories for prosecution rather than minimum criteria.

The Department's guidelines are clear and the United States Attorneys have been instructed by both the Attorney General and the head of the Criminal Division to use these guidelines to prosecute obscenity cases. A Justice Department official told the Commission in Chicago, "These are not declination guidelines, they are priority guidelines."[183]

Since the time of these directives fewer than ten federal districts[184] have brought obscenity prosecutions despite the presence of large scale distributors and organized crime involvement in their jurisdiction[185]

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[182] *Id.*

[183] Chicago Hearing, Vol. II, James S. Reynolds, p. 267.

[184] *Id.*

[185] The Criminal Division of the United States Department of Justice has compiled and provided the following statistics with respect to recent and current obscenity law prosecutions.

Adult Pornography

| | Indicted | Convicted |
|---|---|---|
| 1978 | 11 | 20 |

There is widespread evidence that the stated policy of the Department of Justice and the established guidelines are not being implemented by the United States Attorneys.[186] Very few obscenity cases have been brought by the United

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| | | |
|---|---|---|
| 1979 | 1 | 2 |
| 1980 | 54 *1 | 1 |
| 1981 | 2 | 15 *2 |
| 1982 | 7 | 4 *3 |
| 1983 | 0 | 2 |
| 1984 | 6 | 11 *4 |
| 1985 | 19 | 14 *5 |
| 1986 | | 2 *6 |

*1 Includes 45 MIPORN defendants.
*2 Includes 5 MIPORN defendants. Convictions of two other MIPORN defendants in 1981 were reversed on appeal.
*3 Includes 1 MIPORN defendant.
*4 Includes 6 MIPORN defendants.
*5 Includes 2 MIPORN defendants.
*6 Both are MIPORN defendants.

Districts Which Have Prosecuted Adult Pornography Cases Since January 1, 1978

Northern District of Alabama
Southern District of Alabama
Central District of California
Middle District of Florida
Southern District of Florida
District of Kansas
Eastern District of Kentucky
Western District of Kentucky
District of Massachusetts
District of Nebraska
Eastern District of New York
Western District of New York
Western District of North Carolina
Western District of Pennsylvania
Eastern District of Tennessee
Western District of Tennessee
Western District of Texas
District of Utah
Eastern District of Virginia

Districts In Which Adult Pornography Cases Are Presently Pending

Southern District of Florida
District of Utah

Statistics have been obtained from several sources. While they are essentially complete, it is possible a few cases may have been omitted. Letter from Donald B. Nicholson to Alan E. Sears (Feb. 28, 1986).

[186] Chicago Hearing, Vol. I, Paul McGeady, p. 82-3.

States Attorneys. In addition, the Department of Justice and the United States Attorneys have cited the rigorous pursuit of child pornography cases as compliance with the Attorney General's mandate and as a rationale for neglecting obscenity prosecutions.

From May 1, 1984, through July 1985, there were obscenity prosecutions in only seven of the ninety-four federal districts.[187]

There were no obscenity prosecutions in the districts encompassing the Southern District of New York (Manhattan) or the Central District of California (Los Angeles)[188] where the majority of obscene materials are now and were then being produced or distributed.[189]

One witness testified before the Commission that he contacted the office of the United States Attorney for the Central District of California in Los Angeles and requested information regarding the number of obscenity prosecutions brought by that office during the period from 1979 to 1982 along with the number of defendants involved and the number of convictions which resulted.[190] The United States Attorney responded that during that period there was only one prosecution and it involved child pornography.[191] In a letter dated February 22, 1984, the United States Attorney for the Central District of California in Los Angeles, said that it would be a "misuse of the limited resources of this office to prosecute so-called adult films" and added that he and his predecessor had concluded that films of this variety could not be prosecuted successfully in that district.[192]

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[187] Chicago Hearing, Vol. II, James S. Reynolds, p. 267. In addition it is noted that this Commission invited United States Attorneys from several major districts to attend and testify at its hearings. No United States Attorney whose office does not prosecute obscenity cases accepted the invitation to appear before the Commission to explain their policy.

[188] *Id.* at 267, 271.

[189] Chicago Hearing, Vol. 1, Donald Smith, p. 30-31.

The perception is pervasive among federal law enforcement agents that most United States Attorneys will not prosecute cases involving obscene matter. According to an Assistant Chief Postal Inspector, the Postal Inspection Service presents very few obscenity cases to the United States Attorneys because federal prosecutors will not authorize prosecution.[193] Experiences of Postal Inspectors in which federal prosecutors have declined prosecution of cases have dissuaded them from fully using their existing resources to investigate obscenity cases.[194]

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[190] Chicago Hearing, Vol. I, Paul McGeady, p. 82-83.

[191] Id. at 83.

[192] Chicago Hearing, Vol. I, Paul McGeady, p. 83-85; During the same period the Los Angeles Police Department was actively involved in the investigation of major obscenity distributors; Chicago Hearing, Vol. I, Donald Smith, p. 33; Since 1973 the Los Angeles Police Department vice division successfully convicted offenders in over three hundred obscenity cases. In addition, it is noted that the Los Angeles Police Department cases were prosecuted in California state courts which use the Memoirs-Roth test, a much more difficult legal standard than in the federal courts which apply Miller. Los Angeles Hearing, Vol. I, James Docherty, p. 6; See also, The discussion of the History of Regulation and First Amendment Considerations for further information.

An agent of the United States Customs Service testified that his office had made countless thousands of seizures of adult materials over the last two years, but had presented none of them to the United States Attorneys' offices.[195] The agent said it was his understanding from the Assistant United States Attorneys that the Department of Justice policy was not in favor of prosecuting obscenity cases and presentation would be pointless.[196] Similar statements have been received from federal agents in Minnesota and New York.[197] The same Customs agent testified that he had presented fifty different child pornography seizures to the United States Attorneys for prosecution of which approximately forty-seven were accepted for prosecution.[198]

While the Departmental guidelines make both child pornography and enumerated types of adult material of equal priority, there is a practice of prosecuting child pornography ahead of all else and to the virtual exclusion of obscenity cases. A Department of Justice official testified that all child pornography cases "merit priority" while the Department seeks obscenity cases which would have "significant deterrent effect."[199]

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[193] Washington, D.C., Hearing, Vol. I, Jack Swagerty, p. 138.

[194] Id. at 70-71.

[195] Id.; Chicago Hearing, Vol. I, Jack O'Malley, p. 117-18.

[196] Id.

[197] Chicago Hearing, Vol. I., Paul McGeady, p. 85-86.

[198] Chicago Hearing, Vol. I., Jack O'Malley, p. 119.

Despite stated departmental objectives, in practice, emphasis on child pornography to the exclusion of adult obscenity cases is apparent.[200] While aggressive prosecution of child pornography cases is laudable, it should not be a justification for the failure to prosecute appropriate cases involving obscene material. The small number of obscenity prosecutions is not a product of the Department's existing guidelines. The lack of obscenity prosecutions is a result of the way in which the guidelines have been interpreted and not implemented by United States Attorneys. The reverse of the Department's stated policy appears to be the actual practice. The guidelines are used as a basis for declination, i.e.: a reason to "get rid of a case presented", and are not used to establish prosecution priorities. This practice has created the perception among federal law enforcement agents that the work necessary to present an obscenity case to the United States Attorney's office is a wasted effort.[201]

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[199] Chicago Hearing, Vol. II, James S. Reynolds, p 266.

[200] From 1978 through February, 1986, 255 persons were indicted and 215 individuals convicted of child pornography law violations. This should be contrasted with one hundred indictments and seventy-one convictions for obscenity law violations during the same period.

The United States Attorneys should make, as the Assistant Attorney General requested in his memorandum, a realistic appraisal of the obscenity problem in their respective jurisdictions. They should identify existing violations of obscenity laws, use Departmental guidelines to create priorities and begin to prosecute offenders aggressively and without further delay.

In implementing the priorities under the Department of Justice Guidelines, the United States Attorneys may consider examining the nature of the obscene materials. This may be done in accordance with this Commission's findings of harm with respect to each class of material.[202]

Only the Attorney General by direct and continuous action and personal supervision can ultimately ensure that these federal officers fulfill their responsibility in this neglected area. This attention and supervision should result in immediate positive results in law enforcement and prosecution efforts. The effects of this action will have long term consequences and will serve as the foundation for a continuing prosecution and enforcement program.

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[201] See, Chicago Hearing, Vol. I, Jack O'Malley; Washington, D.C., Hearing, Vol. I, Jack Swagerty.

[202] See, The discussion of the harms and benefits attributable to each type of material in Part Two.

## RECOMMENDATION 12:

THE ATTORNEY GENERAL SHOULD APPOINT A HIGH RANKING OFFICIAL FROM THE DEPARTMENT OF JUSTICE TO OVERSEE THE CREATION AND OPERATION OF AN OBSCENITY TASK FORCE. THE TASK FORCE SHOULD CONSIST OF SPECIAL ASSISTANT UNITED STATES ATTORNEYS AND FEDERAL AGENTS WHO WILL ASSIST UNITED STATES ATTORNEYS IN THE PROSECUTION AND INVESTIGATION OF OBSCENITY CASES.

### DISCUSSION

The Attorney General should create a task force under the direction of a high ranking official, of no less stature than a Deputy Assistant Attorney General, to investigate and prosecute obscenity law violations. The director of the task force should be included in all pertinent policy and budget decisions. The individual appointed must have a high degree of personal commitment to the objective of this task force which will requires countless hours of personal supervision. This task force should attack the obscenity problem in a concerted and organized manner.

The director of the task force should enlist aggressive and well trained prosecutors and investigators. Experienced prosecutors could be detailed from the Department of Justice or the United States Attorneys' offices on a full-time and/or part-time basis. The Federal Bureau of Investigation, the

United States Customs Service and the United States Postal Service should all contribute investigators to the task force. All prosecutors should be seasoned trial attorneys familiar with complex obscenity law issues and defense tactics.

The task force members should be brought together by the Department of Justice for intensive training and then begin immediate service. A selected number of prosecutors from each United States Attorney's office including selected United States Attorneys should also participate in this training to enable them to understand and deal with the problem in each and every federal district where violations occur.

The task force should be used to address two major concerns. First, the task force prosecutors would be particularly helpful in jurisdictions in which the United States Attorneys are burdened with heavy caseloads and believe they cannot allocate manpower to prosecute such crimes or where the Assistant United States Attorneys lack expertise in obscenity prosecutions.[203] The task force would play a support role for the United States Attorneys and federal investigators by assisting them with their cases and by serving as a national resource for legal and technical advice as well as a source of information. Second, the task force could be used to assist, or at their request, relieve United States Attorneys of these responsibilities during major investigations of a national scope.

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[203] Chicago Hearing, Vol. II, James S. Reynolds, p. 272-73; Chicago Hearing, Vol. I, Paul McGeady, p. 85; Chicago Hearing, Vol. II, Larry Parrish, p. 216-17.

The task force would complement the permanent staff of United States Attorneys as needed or when requested completely take over investigation and prosecution in a particular district.

RECOMMENDATION 13:

THE DEPARTMENT OF JUSTICE SHOULD INITIATE AN OBSCENITY LAW ENFORCEMENT DATA BASE WHICH WOULD SERVE AS A RESOURCE FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENCIES.

There is no government department or agency which presently serves as a centralized source of complete information for prosecutors and investigators involved with obscenity cases.[204] Federal prosecutors and investigators must currently "recreate the wheel" in almost every new case developed. Many cases involve the same corporations and individuals and a duplication of efforts is a substantial waste of precious investigative time and resources. The Obscenity Task Force discussed in the Department of Justice

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[204] Currently the Department of Justice, Criminal Division, General Litigation and Legal Advice Section has one person to assist prosecutors with information and advice in this area of law. It is impossible for one person, with the present mandate, to fulfill the need as described herein.

Recommendation should be complemented by the creation of such a data base within the Department of Justice.

The data base should consist of profiles of cases prosecuted, case histories, corporate records, real estate records, a brief bank, information concerning known offenders, individuals associated with organized crime families and any other information pertinent to the investigation and prosecution of obscenity cases. The data base would enable federal, state, and local law enforcement personnel to draw on information and expertise gathered nationwide. This data base should also cross-reference the information contained in the data base created for child pornography.205

Two experienced Department of Justice Attorneys with adequate support staff could easily administer this project which would result in a substantial reduction of investigative expenses. The information should be readily available to law enforcement agencies in the legitimate investigation of criminal activity, but safeguards should be enacted to avoid and potential abuse of individual civil liberties.

RECOMMENDATION 14:

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[205] See, The discussion in Child Pornography for further information.

THE UNITED STATES ATTORNEYS SHOULD USE THE LAW ENFORCEMENT COORDINATING COMMITTEES TO COORDINATE ENFORCEMENT OF THE OBSCENITY LAWS AND TO MAINTAIN SURVEILLANCE OF THE NATURE AND EXTENT OF THE OBSCENITY PROBLEM IN THE LOCALITIES WITHIN THEIR DISTRICTS.

The Law Enforcement Coordinating Committees (LECCs) developed under the direction of former Attorney General William French Smith are comprised of the United States Attorney and representatives of federal, state, and local law enforcement agencies within the particular judicial district. The LECC's objective is to improve cooperation and coordination among participating agencies. In addition the LECCs develop law enforcement priorities for the district, target the most serious crime problems and provide a forum for an exchange of information and intelligence.

The United States Attorney for the Northern District of New York arranged a LECC conference on child pornography in his district.[206] The two hundred law enforcement personnel in attendance were addressed by Federal Bureau of Investigation Agents, United States Postal Inspectors, state police, and state and local prosecutors.[207] The New York conference greatly increased awareness of the child pornography problem and contributed to the almost immediate initiation of at least three child pornography prosecutions.[208]

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[206] Chicago Hearing, Vol. II, Frederick J. Scullin, p. 39.

[207] Id.

In July 1984, the United States Attorney for the Eastern District of North Carolina established an LECC subcommittee to investigate obscenity, organized crime and child abuse.[209] At that time the North Carolina obscenity law was considered one of the weakest in the United States and the state had the highest number of "adults only" pornographic outlets per capita of any state in the nation.[210] The North Carolina LECC subcommittee was comprised of federal, state and local law enforcement officials and spent a year developing a law enforcement blueprint.[211] The subcommittee discovered involvement of organized crime members and their associates in the obscenity business in North Carolina.[212] As a result of its investigation the LECC subcommittee drafted and recommended a more effective state obscenity law which was subsequently enacted by the North Carolina legislature.[213] They also recommended continued cooperation between federal and state authorities, and the creation of a statewide

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[208] Id. at p. 39-40.

[209] New York Hearing, Vol. II, Robert Showers, p. 60.

[210] Id. at 59.

[211] New York Hearing, Vol. II, Sam Currin, p. 90.

[212] New York Hearing, Vol. II, Robert Showers, p. 61.

[213] Id. at 63.

"pornography task force."214 As a result of these efforts by the LECC subcommittee, the distribution of obscenity in North Carolina can now be more effectively controlled.215 These two examples illustrate the effectiveness of the LECCs when utilized by United States Attorneys who are committed to fighting obscenity and its related organized crime elements.

The Department of Justice guidelines allow United States Attorneys to prioritize obscenity cases where a particular problem has been identified in the district. The LECCs are a means for the United States Attorney to maintain surveillance of the nature and extent of obscenity trafficking in his or her particular jurisdiction and they should be used specifically for that purpose.

RECOMMENDATION 15:

THE DEPARTMENT OF JUSTICE AND UNITED STATES ATTORNEYS SHOULD USE THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) AS A MEANS OF PROSECUTING MAJOR PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.

Recent amendments to the Racketeer Influenced and Corrupt Organizations Act (RICO) made obscenity offenses predicate

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[214] _Id_. at 65; New York Hearing, Vol. II, Sam Currin, p. 90.

[215] New York Hearing, Vol. II, Robert Showers, p. 64.

crimes under the statute.[216] To date, no prosecutions against producers or distributors of obscene material have been brought under RICO in any of the ninety-four federal districts. RICO was enacted as part of the Organized Crime Control Act of 1970.[217] Prosecution under RICO arises when an individual demonstrates an established pattern of racketeering activity. Section 1961(5) requires that at least two of the federal or state predicate crimes enumerated in section 1961(1) must have been committed by the individual within a ten year period.[218] Offenses relating to obscenity are included among the predicate offenses.[219] The activities proscribed under RICO are listed in section 1962 as follows:

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[216] 18 U.S.C. SS1961-1968 (West Supp. 1985). Section 1961 (5) defines a "pattern of racketeering activity as at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. Section 1961 (1) defines "racketeering activity" as (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 172, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of state or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions of payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act; Any of those acts or offenses constitute a predicate act under RICO.

(a) investing proceeds of a pattern of racketeering in an enterprise.

(b) acquiring or maintaining an interest in an enterprise through a pattern of racketeering.

(c) conducting affairs of an enterprise through a pattern a racketeering.

(d) conspiring to violate (a), (b), or (c).[220]

The penalty provisions of 18 U.S.C. ©1963 provide for a fine of not more than $25,000 or imprisonment for not more than twenty years or both.[221] The statute also provides for mandatory forfeiture of:

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[217] 18 U.S.C. SS1961-1968 (West Supp. 1985).

[218] Id; A predicated crime is one upon which an action under RICO can be based.

[219] 18 U.S.C. S1961(1)(B).

[220] 18 U.S.C. S1962 (West Supp. 1985).

(a) a defendant's interest in any enterprise acquired with racketeering income.

(b) interests, securities, claims or contractual rights of an illegally controlled enterprise.

(c) proceeds or property derived from such proceeds.

Department of Justice guidelines regarding RICO prosecutions appropriately prohibit a United States Attorney from bringing an indictment for a violation of section 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction.222 Thus an individual could not be indicted under RICO based on violations of 18 U.S.C. S1461 (mailing obscene matter) and 18 U.S.C. S1463 (mailing indecent matter on envelope or wrapper) if both arise out of the same mailing. This is a situation which may occur frequently in obscenity cases and thus preclude the United States Attorney from prosecuting under

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[221] 18 U.S.C. S1963 (West Supp. 1985).

[222] United States Department of Justice, United States Attorney's Manual, Title 9, Chapter 110., p. 4. (June 18, 1981).

RICO.[223] It should be obvious that the stringent forfeiture provisions under RICO would be one of the strongest weapons in the prosecution arsenal and could, in appropriate cases, virtually eliminate a large scale pornography operation.

RECOMMENDATION 16:

THE DEPARTMENT OF JUSTICE SHOULD CONTINUE TO PROVIDE THE UNITED STATES ATTORNEYS WITH TRAINING PROGRAMS ON LEGAL AND PROCEDURAL MATTERS RELATED TO OBSCENITY CASES AND ALSO SHOULD MAKE SUCH TRAINING AVAILABLE TO STATE AND LOCAL PROSECUTORS.

The preparation for trial of an obscenity case involves complex legal and procedural issues. An inexperienced prosecutor may often encounter an experienced defense counsel who specializes in obscenity law and travels throughout the country defending these cases. Defenses and issues which are raised in each case are likely to be similar in prosecutions throughout the country. Trial and appellate case law developed in state and federal cases are very similar. Poorly developed case law developed on the state level can have adverse effects on federal prosecutions and vice versa.

Training programs offered by the Department of Justice that prepare attorneys to address these issues will enable federal prosecutors to be more knowledgeable and effective. They would be of similar value to state and local prosecutors if made available to them. These programs should include a familiarization with defense tactics which may include personal attacks on harassment or law suits against prosecutors and investigators.

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[223] See, Recommendations for Changes in Federal Law in this Chapter.

RECOMMENDATION 17:

UNITED STATES ATTORNEYS SHOULD USE ALL AVAILABLE FEDERAL STATUTES TO PROSECUTE OBSCENITY VIOLATIONS INVOLVING CABLE AND SATELLITE TELEVISION.

The contents of some programs shown on cable and satellite television channels have become a matter of increasing public concern.[224] Some of the feature films shown depict sexual themes, sexual acts and materials which may be obscene under Miller.

The obscenity standard enunciated by the Supreme Court in Miller v. California can be applied to material transmitted over cable television. When the United States Supreme Court declared that obscenity is not protected speech under The First Amendment, no distinction was made as to the medium of expression.225 As the United States District Court in Utah found in Community Television of Utah v. Roy City,[226]

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[224] See, The discussion of Child Pornography Regulation for further information.

> The Miller standard is applicable. It is a national standard with a core of uniformity which allows for a degree of flexibility at a community level. It may be uniformly applied to almost all forms of publicly available communication. Books, magazines, cassettes, periodicals, movies, and cable television are all treated essentially in the same fashion regardless of numbers. (emphasis added)[227]

The court went on to explain, "The Court finds great difficulty in distinguishing (other than the popcorn) between going to the movies at a theatre and having the movies come to me in my home through electronic transmission over wire. The choice is mine. The location is different. The content is the same."[228]

An individual may possess and view obscene materials in the privacy of his own home.[229] Despite popular arguments to the contrary, it is well established in decisions by the United States Supreme Court that there is no correlative right to receive, import, or distribute the obscene

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[225] Kaplan v. California, 413 U.S. 115, 118-19(1973).

[226] Id. at 116.

[227] 555 F. Supp. at 1164 (D. Utah 1982).

[228] Id. at 1170.

[229] See, Stanley v. Georgia, 394 U.S. 557, 568(1969).

materials. (emphasis added)230 An argument that in the cable area the obscene materials are exhibited to consenting adults only is not a defense to an obscenity prosecution.231

The Court in Paris Adult Theatres I v. Slaton,[232] stated,

> Finally, petitioners argue that conduct which directly involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take.[233]

In addition to the federal obscenity laws codified in 18 U.S.C. S1461, the Cable Communication Policy Act of 1984 provides another avenue for the prosecution of obscenity shown over cable television.[234]

The Act, provides:

> Whoever transmits over any cable system any matter which is obscene or otherwise

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[230] See, United States v. Reidel, 402 U.S. 351(1971); United States v. 37 Photographs, 402 U.S. 363, 376(1971).

[231] See, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57(1973).

[232] 413 U.S. 49(1972).

[233] Id. at 68.

[234] 47 U.S.C.A. S559 (West Supp. 1985).

> unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both.[235]

This section should be used by federal prosecutors if potential conflicts within such Chapter are resolved. Prosecutors should also vigorously enforce any new legislation enacted in the area.

The inability of law enforcement officials to control obscene cable programming is compounded by the inaction of the Federal Communications Commission in this entire area and makes enforcement efforts by United States Attorneys in each district essential.

## D. RECOMMENDATIONS FOR STATE AND LOCAL PROSECUTORS

### RECOMMENDATION 18:

**STATE AND LOCAL PROSECUTORS SHOULD PROSECUTE PRODUCERS OF OBSCENE MATERIAL UNDER THE EXISTING LAWS INCLUDING THOSE PROHIBITING PANDERING AND OTHER UNDERLYING SEXUAL OFFENSES.**

Existing state laws provide penalties for pandering. Pandering or "pimping" generally involves the procuring of an individual to commit an act of prostitution for some form of consideration.

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[235] Id. See, The discussion of the difficulties associated with enforcement of this statute.

The production of obscene material almost always involves acts of prostitution. Performers are recruited and paid or otherwise induced (voluntarily or involuntarily) by producers to perform or have performed upon them various sexual acts including intercourse, fellatio, cunnilingus, sodomy and bestiality. These acts are filmed or otherwise recorded for reproduction and commercial distribution. By procuring an individual to commit an act of prostitution the producer of obscene material is acting in the same capacity as a pimp.[236] Like any other pimp he reaps his financial reward from these acts of prostitution.

Pandering laws are an effective law enforcement tool since they present a separate and distinct crime and do not require proof of obscenity.[237] Law enforcement officers should view the pandering which takes place through the production of obscene materials the same as pandering in any other prostitution case. This Commission has heard substantial testimony regarding coercion used in the production of sexually explicit materials. We accordingly suggest that law enforcement officers should use considered judgement and avoid unnecessary charges of prostitution against the performers.

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[236] *See, People v. Fixler*, 56 Cal. App. 31 321, 128 Cal. Rptr. 363 (1976); *United States v. Roeder*, 526 F.2d 736, 739(10th Cir. 1975), *cert. denied* 462 U.S. 905.

[237] An investigator who testified before the Commission recounted the following experience, "Another area that we are presently using for enforcement is in the area of pandering. In one of our recent cases we charged a hard-core film producer with pandering.

It was our contention that this individual by the name of Hal Freemen, who runs a company by the name of Hollywood Video in Los Angeles, was hiring these girls to commit sex acts for money, which is prostitution, this he was a pimp." Chicago Hearing, Vol. I, Donald Smith, p. 36.

State and local prosecutors should also scrutinize obscene material for evidence of any other underlying criminal offenses such as physical sexual abuse and bring appropriate charges against the persons responsible for the commission of such crimes.

Persons who appear in pornographic materials often may be doing so under threat of force or coercion.[238] Law enforcement officers should be sensitive to claims of sexual assault, sexual imposition, rape or related crimes of violence against performers. While some performers are willing to engage in the sexual activities required during the production of pornographic materials, law enforcement officers should remain aware of the significant possibility that performers who are forced to engage in certain sexual acts are victims of these underlying crimes.

RECOMMENDATION 19:

STATE AND LOCAL PROSECUTORS MUST MAKE A CAREFUL ASSESSMENT OF

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[238] See also, The discussion of Child Pornography Regulation.

THE OBSCENITY PROBLEM IN THEIR JURISDICTIONS, IDENTIFY OFFENDERS INVOLVING BOTH ADULT AND CHILD MATERIAL AND COMMENCE PROSECUTION WITHOUT FURTHER DELAY.

There is no substitute for an aggressive prosecutor who will vigorously enforce the existing obscenity laws. Prosecutors in Orlando; Florida; Atlanta; Georgia; and Cincinnati, Ohio, have compiled impressive records in enforcing the laws of those states.

For sixteen years[239] the Solicitor for Fulton County, Georgia, aggressively prosecuted any obscenity violation brought to the attention of that office. As a result Atlanta now has no theatres or bookstores which show or sell materials that would be found obscene under Miller.[240] Consistent enforcement efforts have had a substantial deterrent effect.[241]

In Cincinnati, there are no bookstores, movies or cable television programs which are sexually explicit and would be found obscene under Miller.[242] The chief of the Cincinnati vice squad attributed this result to "a strong prosecutor and a prosecutor willing to accept the cases and go ahead and prosecute."[243]

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[239] Chicago Hearing, Vol. II, Hinson McAuliffe, p. 177.

[240] Id. at 185.

[241] Id. at 185-86.

[242] Chicago Hearing, Vol. I, Harold Mills, p. 93.

In Houston, prosecution of pornography cases has been a high priority and the prosecutor has maintained a conviction rate of ninety-two percent while handling over two hundred cases per year.[244]

For the past fifteen years, only one detective on the Miami, Florida, police department has been assigned to investigate obscenity violations.[245] During that time, this investigator has brought over one thousand cases for prosecution and a conviction was obtained in every case.[246] The number of "adults only" pornographic outlets in Miami has decreased during this same period from twenty-three to eight.[247]

Local law enforcement agents should also seek assistance from federal agencies to effectively combat organized crime involvement in pornography when identified. According to a local law enforcement officer, "Without the mutual exchange of information of the joint task force, local law enforcement cannot and will not be able to cope with the situation of organized crime and the delivery and dissemination of pornography . . ."[248]

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[243] Id.

[244] Houston Hearing, Vol. I, W.D. Brown, p. 49.

[245] Miami Hearing, Vol. I, Mike Berish, p. 63.

[246] Id. at 64.

[247] Id at 63.

State and local prosecutors must accept the challenge and enforce the existing laws stringently and consistently so that purveyors of obscene material will find no haven in their jurisdictions. These efforts should be based upon an evaluation of the relative harmful effects of materials available.[249] This evaluation should include particular consideration of explicitly violent materials and materials which are humiliating or degrading.

RECOMMENDATION 20:

STATE AND LOCAL PROSECUTORS SHOULD ALLOCATE SUFFICIENT RESOURCES TO PROSECUTE OBSCENITY CASES.

*See*, Recommendation 19 for further discussion of resources devoted to obscenity investigation and prosecution.

RECOMMENDATION 21:

STATE AND LOCAL PROSECUTORS SHOULD USE THE BANKRUPTCY LAWS TO COLLECT UNPAID FINES.

Courts frequently impose a monetary fine after a conviction for an obscenity violation. In a number of cases, especially those involving corporate defendants, these fines may go unpaid. Once conventional means of collecting of such fines have been exhausted these outstanding judgments can be satisfied by the use of bankruptcy laws.[250] When a defendant accumulates two or more outstanding debts the prosecutor can file an involuntary bankruptcy petition and the court can ultimately take custody of any assets and liquidate them to satisfy those debts including unpaid fines. The liquidation should include items of value such as real property, structures and fixtures. The liquidation would not include the sale or distribution of obscene material which may be a part of the inventory. All such material would be disposed of in the manner provided by law.

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[248] New York Hearing, Vol. II, William Johnson, p. 82.

[249] *See*, The discussion of Harms, *supra*.

The prosecutor in Atlanta, Georgia, successfully used the bankruptcy laws to collect fines and made it unprofitable for many dealers in obscene material to stay in business.[251]

The bankruptcy proceedings are also useful in determining the true ownership of the businesses who deal in obscene materials. This is particularly helpful when "sham" or "shell" corporations are used to conceal ownership. The results may also assist prosecutors to target the culpable individuals for subsequent criminal prosecution.

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[250] 11 U.S.C. S302 (Supp. II 1984).

[251] Chicago Hearing, Vol. II, Hinson McAuliffe, p. 183-84.

State and local prosecutors also may enlist the assistance of federal investigators and prosecutors when dealing with a major obscenity distributor with substantial resources. These federal agents and prosecutors could assist in identifying the resources and their location for inclusion in the bankruptcy action.

RECOMMENDATION 22:

STATE AND LOCAL PROSECUTORS SHOULD USE ALL AVAILABLE STATUTES TO PROSECUTE OBSCENITY VIOLATIONS INVOLVING CABLE AND SATELLITE TELEVISION.

State and local prosecutors should prosecute cable and satellite television programmers or operators under existing state statutes for exhibiting any program that is obscene under the Miller test. The Commonwealth's Attorney for the city of Virginia Beach, Virginia, monitored and videotaped fifty hours of programming on a local cable channel, shown in his jurisdiction. Thirteen and one half hours of the videotaped programming were submitted to a grand jury, which returned seven indictments against the cable operator for distributing obscene material. As a result of those indictments, the cable operator eliminated the channel in question from its program offerings.[252]

*See*, Department of Justice Recommendations and Recommendations for Law Enforcement Officers in this Chapter.

RECOMMENDATION 23:

STATE AND LOCAL PROSECUTORS SHOULD ENFORCE EXISTING CORPORATE LAWS TO PREVENT THE FORMATION, USE AND ABUSE OF SHELL CORPORATIONS WHICH SERVE AS SHELTERS FOR PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.

Producers and distributors of obscene material often use multiple corporate entities as a means of concealing the true ownership or nature of their businesses.[253] They typically create layers of corporations to insulate their identities from a claim of actual ownership. Separate corporations may be formed to perform the different operations of a single bookstore. Separate corporations may be formed to control the sale of magazines, operate the bookstore, construct peep show booths, collect coins from peep show booths, and to repair the same booths.[254]

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[252] National Decency Reporter, Vol. 22, No. 3, p. 1 (May-June 1985).

[253] New York Hearing, Vol. II, William Johnson, p. 82.

[254] *Id*.

The articles of incorporation and other documents may list as incorporators, shareholders or officers the names of mere employees or even strangers. The names may be on the documents without the named person's knowledge or consent.[255] Some producers and distributors may rely on law enforcement knowledge of such practices to argue they are not the true owners even though listed as such.

Law enforcement officers face difficult burdens in identifying and bringing charges against or collecting taxes from the true owners who hide behind these shell corporations. Often they can locate only low level employees who may be unfamiliar with the identity of the persons who actually own or control the operation of the business.256

State laws governing the formation of corporations should be enforced fully to permit the identification of those persons managing and financing the obscenity industry. Corporate charters should be revoked when fraud is proven and the assets seized when permitted.

RECOMMENDATION 24:

STATE AND LOCAL PROSECUTORS SHOULD ENFORCE THE ALCOHOLIC BEVERAGE CONTROL LAWS THAT PROHIBIT OBSCENITY ON LICENSED PREMISES.

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[255] Id.

[256] Id.

Establishments that display or sell obscene materials may also be licensed by the state or locality to sell alcoholic beverages. State and local alcoholic beverage control laws often prohibit obscene material and obscene performances on the licensed premises. Enforcement of these laws or ordinances in the courts or through administrative procedures is another tool at the disposal of law enforcement agents to remove pornography from theatres, restaurants and other establishments.

These enforcement measures should be implemented with recognition of the current social and behavioral science conclusions with respect to various types of materials. Law enforcement officers may consider the potential harm which may be attributable to certain types of materials when establishing criteria for enforcement of this aspect of alcoholic beverage laws.

A finding of guilt under the alcoholic beverage control laws could bring suspension or revocation of an establishment's liquor license. The potential of such a loss of revenue to an individual or business would have a significant deterrent effect.

RECOMMENDATION 25:

GOVERNMENT ATTORNEYS, INCLUDING STATE AND LOCAL PROSECUTORS, SHOULD ENFORCE ALL LEGAL REMEDIES AUTHORIZED BY STATUTE.

*See*, Discussions of nuisance laws, zoning, anti-display statutes, alcoholic beverage control laws.

## E. RECOMMENDATION FOR FEDERAL LAW ENFORCEMENT AGENCIES

### RECOMMENDATION 26:

FEDERAL LAW ENFORCEMENT AGENCIES SHOULD CONDUCT ACTIVE AND THOROUGH INVESTIGATIONS OF ALL SIGNIFICANT VIOLATIONS OF THE OBSCENITY LAWS WITH INTERSTATE DIMENSIONS.

As recommended elsewhere in this report, the United States Attorneys should begin prosecuting appropriate violations of the federal obscenity laws without further delay.[257] The efforts of federal prosecutors must be based upon and complemented by active and thorough investigations of all violations of the obscenity laws by the federal law enforcement agencies.

The Federal Bureau of Investigation (FBI) derives its investigative jurisdiction in this area from the federal statutes covering obscenity and child pornography.[258] From the beginning of fiscal year 1978 through the second quarter of Fiscal Year 1985, the FBI has conducted 2,484 investigations involving interstate transportation of obscene materials and violations involving child pornography.[259] These investigations have resulted in 137 indictments and 118 convictions. Of these figures forty-five indictments and fourteen convictions were the result of the single investigation known as MIPORN.[260] The FBI has given its highest priority to cases involving organized crime.[261] The Federal Bureau of Investigation recently conducted a two year investigation which resulted in the case *United States v. Guglielimi*.[262] This case grew out of an approximately two-year investigation by the Federal Bureau of Investigation regarding obscene materials, particularly bestiality films shipped in interstate commerce into the Western District of North Carolina. The investigation, which first centered around undercover purchases from a relatively small street-corner outlet for "sexual aids" and pornographic magazines, films and pockets books, expanded after a successful search of those premises and interview of the personnel, to a cautious undercover investigation involving telephone calls to, and meetings with, the defendant himself. The introduction to the defendant was made by a former "adult" bookstore operator, and various orders of bestiality films and other materials were followed by a successful search of Central Sales, the defendant's multistory Baltimore warehouse for the shipment of obscene materials. The Grande Jury's eleven-count indictment for violations of Title 18, U.S. Code, Sections 2, 371, 1462 and 1465, followed on June 12, 1985.

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[257] *See*, United States Department of Justice Recommendation 1; "Investigation Authority" is the statutory power granted to an agency to initiate and pursue inquiries into criminal activity.

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[258] 18 U.S.C. SS1462 & 1465; 18 U.S.C. SS2251 - 2255; Washington, D.C., Hearing, Vol. II, William Webster, p. 76.

[259] Washington, D.C., Hearing, Vol. II, William Webster, p. 76.

[260] *Id.*

[261] *Id.* at 77.

[262] C-CR-85-59(W.D.N.C. 1986).

The trial lasted approximately four days, during which a number of bestiality films were displayed, in titles of which indicated the animals portrayed. The defense called a number of "experts" who were experienced defense specialists in pornography cases, several of whom were affiliated with the Institute for the Advanced Study of Human Sexuality, a San Francisco, California, group that includes among its classes a course on testifying for the defense in pornography cases. Information provided by other prosecutors made possible the effective cross-examination of these witnesses. The defense "experts" testified that the materials did not appeal to the prurient interest of the average citizen in the Western District of North Carolina, since the average person does not have such an interest.

The trial in general was characterized by numerous voir dire examinations and arguments on a number of points of law and fact. Pre-trial motions had also been lengthy and had included a Motion of Recuse, by which the defendant sought to have the trial judge, the Honorable Robert D. Potter, to disqualify himself. This motion was denied, and defendant filed a petition for writ of mandamus to the Fourth Circuit, which was also denied.

The jury was similarly unpersuaded by defense arguments and found the defendant guilty of all eleven counts in the indictment. Judge Potter sentenced the defendant to a total of twenty-five years incarceration and a $35,000 fine. The case is now under appeal.

The Director of the FBI told this Commission that while the Bureau does not "downgrade" the seriousness of the problem of obscenity violations involving adult material, "[i]t is simply the implication of our resources."[263] He added that "[i]t will probably mean that there will be less pro-active initiatives on our part" in adult cases that do not involve organized crime.[264]

This Commission received evidence that two of the FBI field offices in one of the nation's most active obscenity distribution centers, New York City, will not investigate cases involving obscene material.[265]

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[263] Id. at 90.

[264] Id.

[265] New York Hearing, Vol. IV, Paul McGeady, p. 126.

The Federal Bureau of Investigation is encouraged to seriously set up its investigative efforts relating to obscenity law violations.

The jurisdiction of the United States Customs Services extends to all materials entering the United States by land, sea or air.[266] Prior to the signing of the Child Protection Act of 1984 (18 U.S.C. SS2251-2255), the United States Customs Service had received direction from Commissioner William Von Raab to step up efforts to intercept obscene material. Special emphasis was placed on material depicting children in sexual explicit conduct. The Customs Service was responsible for six successful child pornography prosecutions in fiscal year 1983. Five of the convictions were violations various state laws and the sixth was a violation Federal Law, 18 U.S.C. S1462. With the signing of the Child Protection Act, the figures changed to fourteen federal convictions and twenty state convictions in 1984, and nineteen federal and ten state convictions as of August 1985.

Until the early part of 1985, the Customs Service's method for initiating child pornography investigations was fairly static. A mail parcel would be examined at one of the twenty-two customs foreign mail facilities. The package, once discovered to contain child pornography, would be forwarded to the Office of Investigations in the District concerned. The case agent would then match the name and/or address of the addressee with other seizures. A background investigation on the addressee would be conducted in order to show other criteria as outlined in the United States Attorneys Manual. Based on the results of the investigation and a controlled delivery of the seized parcel, a search warrant would be obtained and executed on the address in question. In the majority of the search warrants executed, the suspect would be found to have a large collection of imported and home-made child pornography. Additionally, more and more evidence was found to link child molestation to the importers of the child pornography.[267]

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[266] Chicago Hearing, Vol. I, Jack O'Malley, p. 105.

By February 1985, compilations of seizure lists were being made and disseminated throughout the service. Most field offices had assigned at least one, and sometimes several agents to investigate child pornography cases on an exclusive or collateral basis. Foreign mail facilities were targeting the traditional "source" countries of child pornography: Denmark, the Netherlands, and Sweden.

In January 1985, a special delegation representing the United States Customs Service, the United States Postal Inspection Service and the Federal Bureau of Investigation travelled to Europe. Their purpose was to address the issue of foreign cooperative efforts in fighting the child pornography industry.

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[267] In at least one instance, an agent discovered a molestation in progress. (The case resulted in a guilty plea to an information followed by a probationary sentence.)

As a result of these critical contacts, interagency cooperation is expanding. Investigators are beginning to look for the major distributors, producers, and consumers. Increased cooperation with foreign governments had led to two successful undercover operations in 1985. As a result of the increased foreign cooperation, new methods of smuggling, as well as additional source countries and distributors are being identified. Examples include: Transshipment routes through England, France, East Germany, and Southeast Asia countries heretofore not considered source countries, such as France, Italy, Japan, Thailand and the Philippines; and more sophisticated packaging techniques and profiles.

New methods of conducting child pornography investigations are being developed and attempted. These include the adaptation of methods used in narcotics and currency investigations, as well as methods used in the investigation of criminal sex offenses. Some bold and innovative undercover operations have been suggested and implemented.

The Customs Service is actively pursuing the enhancement of existing resources and the development of programs to meet the changing needs of the enforcement effort. It is only by such a process of enhancement and development that the customs service or any other agency can hope to compete with the ingenuity of those who sexually exploit children.

Future efforts in pornography enforcement will center around the activities of the Child Pornography and Protection Unit (CPPU). Criminal investigations that focus on sexual exploitations which involve other customs violations and other forms of obscene material have and are being developed. Such investigations involve customs fraud, unreported currency transactions, and general smuggling. Currently, all obscene material encountered by the customs foreign mail facilities are processed for forfeiture under civil statute. If at some future time the Customs Service becomes involved in criminal investigation of obscene violations, the data already available through this procedure will provide invaluable investigative leads.

Customs examines all parcels which are suspected of containing contraband.[268] With respect to obscenity law cases particular attention is given to parcels from Denmark, Sweden and the Netherlands. These countries have traditionally been the source of child pornography entering the United States.[269] In 1984, Customs seized forty-three hundred parcels which contained suspected obscene materials.[270] Child pornography was found in 50 percent of those.[271] The other items seized were largely adult materials including some depicting bestiality, urination and defecation.272

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[268] Id.

[269] Id. at 106.

[270] Id.

[271] Id.

When a Customs agent seizes obscene material, a notice is sent to the intended recipient of the material. The notice permits the individual to sign a release and forfeit the material to the government. The material is subsequently destroyed and generally no one is prosecuted for an obscenity violation.[273] If the material is child pornography, a controlled delivery is made to the recipient and a search warrant is subsequently executed on the recipient's premises, often leading to the arrest of that individual.[274] According to one Customs agent assigned to Chicago, "countless thousands" of obscenity cases involving obscene materials have not been presented to the United States Attorney because based upon their experience, agents perceive that these cases will not be prosecuted.[275]

The United States Postal Inspection Service has investigative responsibility over all federal criminal violations involving the mails including the use of the mails to distribute obscenity.[276] Investigations are initiated based on citizen complaints, advertisements in sexually

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[272] Id.

[273] Id. at 107.

[274] Id. at 107-08.

[275] Id. at 118.

[276] Washington, D.C., Hearing, Vol. I, Charles Clauson, p. 135.

oriented publications and correspondence initiated by a postal inspector.[277] Postal inspectors are responsible for protecting the mails and postal facilities from criminal attack; for protecting the American public from being victimized by fraudulent schemes where use of the mails is an essential part of the scheme; and for keeping postal management informed of the conditions and needs of the Postal Service.

Postal crimes fall within two broad categories: Criminal acts against the Postal Service, such as, armed robberies, burglaries or theft of mail and misuse of the Postal System such as the mailing bombs, use of the mails to defraud the public and the use of the mails to distribute pornography. The Inspection Service is also responsible for the internal audit of Postal Service operations and for the security of postal facilities and employees. In addition, the Inspection Service is responsible for investigating violations of a number of civil statutes relating to the use of the mails including the Postal False Representations Statute.

Title 18, United States Code, Section 1461, enacted in 1865, is the statute by which the Postal Inspection Service restricts use of the mails to distribute obscene matter. The statute provides for criminal penalties of up to five years in prison, a $5,000 fine, or both, for using the mails to transmit any "obscene lewd lascivious indecent filthy or vile article, matter, thing, device or substance."

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[277] Id. at 136.

Title 18, United States Code, Sections 2251-2255, the Protection of Children Against Sexual Exploitation Act of 1977 and the Child Protection Act of 1984 are the statutes by which the Postal Inspection Service investigates trafficking in child pornography through the mails. The statute provides for criminal penalties of up to ten years in prison and/or a $100,000 fine. The offender's property used in or derived from the crime is subject to criminal and civil forfeiture under this section. Most states have laws dealing with the sale, distribution and/or possession of obscenity. When dual jurisdiction is involved, Inspectors assist local authorities in the enforcement of their laws. On the international level, the Inspection Service cooperates with the Department of State, the United States Customs Service, Interpol and certain foreign postal authorities to stem the flow of obscene material and child pornography into or from the domestic sources.

Congress has also enacted three civil statutes designed to curb the mailing of sexually oriented material. Title 39, United States Code, Section 3006, allowed the Postal Service to refuse to deliver mail in response to advertising which sought to obtain money through the mailing of obscene matter.

Sections 3008-3011, allows postal customers to obtain an order prohibiting any future mailings by anyone who mails them an advertisement which the addressee considers sexually provocative. Title 39 United States Code, authorizes the Postal Service to maintain a list of persons who do not wish to receive sexually oriented advertising and prohibits the mailing of such advertising to persons who have asked to have their names listed. Companion criminal statutes, 18 U.S.C. SS1735-1737, authorize the courts to penalize persons who mail sexually oriented advertising and prohibits the mailing of such advertising the persons whose names are on the list.

The Department of Justice has established enforcement priorities with respect to the obscenity statutes and the Postal Inspection Service's investigative activities are determined accordingly. The Inspection Service has currently established the following priorities:

1. Policy

   All investigations involving the use of the mail to transmit child pornography are given priority attention. Major domestic and foreign dealers in obscene material also receive prompt investigative attention.

2. Child Pornography

   The objective in child pornography cases is to identify and investigate mail order activity. If other offenses such as child abuse are discovered incident to an investigation, this activity is immediately referred to local police or other appropriate authorities.

3. Obscene Material

The objective in the obscenity area is to investigate cases consistent with Department of Justice priorities. These priorities are:

A. Large scale commercial obscenity distributors involved in multi-state operations.

B. Cases in which there is evidence of infiltration by known organized crime figures.

C. Relatively small dealers are occasionally investigated and/or prosecuted, particularly when the material is especially offensive or when numerous customer complaints are present. This provision is maintained to dispel any notion that pornography distributors can insulate themselves from prosecution if their operations fail to exceed a pre-determined size or if they are fragmented into small scale components.

These priorities, supplemented by guidelines Inspectors receive from the Department of Justice in individual cases, form the basis of the Postal Service investigative program. In 1985 the Postal Inspection Service reported activity in the following areas:

NATIONWIDE

15,766 criminal investigations completed.

A total of 5,570 convictions.

Convictions obtained in 98% of all cases brought to trial.

Recoveries, restitutions made and fines imposed - $34.2 million.

PROHIBITED MAILINGS

Obscenity and Child Pornography (18 U.S.C. 1461, 2251, 2252) 183 investigations completed; of these 176 involved "child pornography"

141 convictions for "child pornography" were obtained.

Like other federal agents, postal inspectors present evidence of violations of the law to the appropriate United States Attorney.[278] In fiscal year 1985 the Postal Inspection Service conducted 183 pornography-related investigations which resulted in 179 arrests and 143 convictions.[279] These investigations were principally child pornography cases.[280]

The Postal Inspection Service presents very few cases involving obscene material for prosecution because they have been told by employees of the Justice Department that these cases are "not prosecutable."[281] The Chief Postal Inspector has confirmed that "[i]nvestigations in adult pornography cases have declined in recent years. . . ."[282]

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[278] Id.

[279] United States Postal Inspection Service Statistics (1986).

[280] Id.

[281] Id. at 70.

These three law enforcement agencies are capable of making significant contributions to the investigation and prosecution of violations of the federal obscenity laws. The FBI's efforts in the MIPORN investigation of organized crime figures involved in obscenity distribution resulted in fourteen convictions as of February 1986.[283] The FBI should also include obscenity and related crimes among its Uniform Crime Statistics report. Similarly the Customs Service and the Postal Inspection Service have had much success in their child pornography investigations.[284]

Working with dedicated prosecutors committed to enforcing the obscenity laws, these agencies can have an even greater impact on the reduction of pornography in the United States. They must commit the manpower and resources necessary to fulfill the task and conduct active and thorough investigations of all violations of the federal obscenity laws.

RECOMMENDATION 27:

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[282] Washington, D.C., Hearing, Vol. I, Charles Clauson, p. 138.

[283] Washington, D.C., Hearing, Vol II, William Webster, p. 77; Letter from Donald B. Nicholson to Alan E. Sears (Feb. 28, 1986).

[284] See, Washington, D.C., Hearing, Vol. I, Daniel Mihalko, p. 155-161; Chicago Hearing, Vol. I, Jack O'Malley, p. 110-16; Chicago Hearing, Vol. II, John Ruberti, p. 62-68.

THE INTERNAL REVENUE SERVICE SHOULD AGGRESSIVELY INVESTIGATE VIOLATIONS OF THE TAX LAWS COMMITTED BY PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL.

The Chief of the Internal Revenue Service criminal Division has compared the production and distribution of obscene material to drug trafficking since both generate staggering profits on an international scale but with only minimal tax reporting.[285] Authorities also project that millions of dollars in profits from obscenity may be escaping taxation through use of international banking channels.[286]

Allen I. Goelman, a Los Angeles associate of Reuben Sturman, pleaded guilty to tax evasion charges in November of 1985. Goelman concealed personal earnings of more than $270,000 over a four year period when he served as head of "retail operations" for obscenity distribution. The IRS has recently obtained confidential records from these banks in Switzerland and Holland in an attempt to locate more hidden obscenity-derived profits.[287]

The frequent use of "cash only" transactions in the pornography industry provides other opportunities for tax evasion.[288] Adult bookstores often fail to report lucrative income earned from cash operated peep shows.[289]

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[285] IRS Probing Alleged Money Laundering Abroad by Far Flung Pornography Ring, L.A. Times, Mar. 16, 1985, p. 33.

[286] Id.

[287] Id.; See, The discussion of Organized Crime for further information.

In March of 1986, an IRS official said the current immoral investigation involving obscenity distributors "are" not an isolated incident" and that more income tax prosecutions may be forthcoming.[290] The same official added, "With the unsettled nature of laws defining obscenity, often times the government is forced to deal with people of this type through the tax laws, and in a business this lucrative, if there's a viable tax interest we're going after them."[291] The Commission strongly encourages the IRS to aggressively investigate violations of the tax laws committed by producers and distributors of obscene material.

## F. RECOMMENDATIONS FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES

### RECOMMENDATION 28

STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD PROVIDE THE MOST THOROUGH AND UP-TO-DATE TRAINING FOR INVESTIGATORS

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[288] New York Hearing, Vol. II, William Johnson, p. 73-74.

[289] Id.

[290] L.A. Times, supra note 285.

[291] Id.

INVOLVED IN ENFORCING THE OBSCENITY LAWS.

To ensure that officers assigned to enforce these laws possess the requisite skill, comprehensive training programs should be established in all jurisdictions. This training should include instruction on investigative techniques, prosecution, victim trauma and the particular stress officers must deal with in obscenity law investigations.

Law enforcement officers involved in the investigation of obscenity violations must be thoroughly acquainted with constitutional law including First and Fourth Amendment implications. The legal and procedural aspects are complex and always subject to change. Included in this training should be a working familiarity with the local community standards. This knowledge should serve as the basis for evaluating cases for prosecution. State and local law enforcement officers should be advised continually of judicial interpretations in the obscenity law area.

Law enforcement officers should receive comprehensive training to avoid errors in judgment which can result in civil rights violations as well as potential civil liability for governmental entities and employees. This training should enable the law enforcement officers to perform their duty within constitutional bounds.

Law enforcement officers should be trained to use regional and national information sources in their investigations. The training should emphasize the need to exercise basic investigative techniques and focus on the similarities and patterns in investigation of obscenity law violations and other investigations.

Investigators will often encounter victims who have been abused or traumatized. A component of the training program should focus on methods to deal with these individuals compassionately and to direct them to the appropriate support services. Training in all areas should be provided by experienced investigators to members of their own department and supplemented with participation by prosecutors and investigators from other law enforcement authorities who specialize in this area.

The training should address the inordinate amount of stress these investigators must endure. The psychological and emotional pressure the officers face often results from prolonged undercover investigations dealing with the material on a long term basis and a lack of peer support. One police officer told the Commission:

> . . . those people who seem to have involved themselves in investigations of these matters generally get ostracized by their own peers. Most police officers make a fool out of those investigators that are charged with investigations of these matters. Macho -- I don't know what to say.
> I found most of them (obscenity investigators) to be extremely professional, dedicated policemen with a lot of integrity. It's unfortunate that they are characterized as such in their peer group, because they have a lot of

> integrity. You investigate other types of crimes, gambling and narcotics, you find the seedier aspects of law enforcement in terms of corruption, but for the most part these people have a lot of personal integrity, and surprisingly they have a lot of regard for first amendments rights. That would be a surprise to many people, but they respect it.[292]

It is as important to train officers in methods to deal with stress and peer support as it is in basic investigative techniques.

RECOMMENDATION 29:

STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD ALLOCATE SUFFICIENT PERSONNEL TO CONDUCT INTENSIVE AND THOROUGH INVESTIGATIONS OF ANY VIOLATIONS OF THE OBSCENITY LAWS.

State and local law enforcement agencies in many regions have devoted insufficient manpower to investigation and enforcement of the obscenity laws. This has led to reactive law enforcement where police may respond to citizen complaints made about obscene materials but do not otherwise initiate investigations.[293]

The Los Angeles Police Department has sixty-seven hundred officers, but only eight are assigned to the pornography unit.[294] Los Angeles is the center of production of obscene material in the United States.[295] The Chicago Police Department has twelve thousand officers, but only two are assigned to their obscene matter unit.[296] The Buffalo, New York, police department has one thousand officers with one officer assigned to obscenity law violations.[297] In Chicago, the unit investigating obscenity violations has requested additional manpower but such requests have been denied by higher authorities within their police departments.[298]

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[292] New York Hearing, Vol. I, Carl Shoffler, p. 227-28.

[293] See, supra note 174 for discussion of proactive and reactive enforcement and prosecution.

Intensive and thorough investigations of possible obscenity violations cannot be conducted unless sufficient manpower is devoted to the task. The need for additional manpower is even more critical in those jurisdictions with large scale pornography operations where investigations are more complex and time consuming.

Chiefs of police and supervisory personnel must also be responsive to requests for additional manpower should the obscenity problem warrant more intensive investigation. These responses may take the form of additional investigative personnel on a temporary or permanent basis.[299] Supervisory

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[294] Chicago Hearing, Vol. II, Donald Smith, p. 46.

[295] Los Angeles Hearing, Vol I, James Docherty, p. 6.

[296] Chicago Hearing, Vol. I, Thomas Bohling, p. 13.

[297] Chicago Hearing, Vol. II, John Dugan, p. 193.

[298] Chicago Hearing, Vol. II, Officer Tom Bohling, p. 14; Miami Hearing, Vol. I, Sergeant Mike Berish, p. 85-86.

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[299] In Cincinnati, Ohio, the focus on obscenity law violations is reported to have resulted in a significant decrease of reported crimes. Statistics of Reporting Area-14 - 800 & 900 Block of Vine Street, which had (1) Massage Parlor, (2) X-Rated Bookstores and (1) "Soft Core" Movie Theater in 1974, all closed by 1979.

1974

PART I OFFENSES (MAJOR)
2 - Rapes
29 - Robberies
7 - Agg. Assaults
24 - Breaking/Enterings
63 - Larcenies
24 - Thefts
17 - Non-Agg. Offense
166 - TOTAL

PART II ARRESTS (MINOR)
14 - Assaults
2 - Forgeries
3 - Frauds
1 - Embezzlement
2 - Vandalism
7 - Weapons Violations
52 - Prostitution Offenses
4 - Other Sex Offenses
85 - TOTAL

1979

PART I OFFENSES
8 - Robberies
4 - Agg. Assaults
1 - Breaking/Entering
15 - Larcenies
28 - TOTAL

PART II ARRESTS
1 - Sex Offense
10 - Drug Abuse
1 - Gambling Offense
31 - Disorderly Conduct
1 - Vagrancy
5 - Other Offenses
49 - TOTAL

The above statistics represent an 83% decrease in Part I offenses, 42.35% decrease in Part II arrests. Letter from Lieutenant Harold Mills to Alan E. Sears (July 29, 1985).

The Phoenix Ordinance was based on two hypotheses: first, that there are direct impacts which uniquely relate to this class of land use; and second, that there are indirect, but equally potent, attitudinal concerns which result from proximity to an adult business. Examples of the former are possible traffic congestion, unusual hours of operations, litter, noise, and criminal activity. Illustrating the latter is substantial testimony that has indicated that many neighborhood residents dislike living near an area containing an adult business. Also, financial institutions take nearby adult businesses into account when financing residential properties. Finally, people's perceptions of criminal activity is reinforced by a great incidence of sexual crimes in areas or commercial districts containing adult businesses.

This study specifically shows that there is a higher amount of sex offenses committed in neighborhoods in Phoenix containing adult businesses as opposed to neighborhoods without them. In this project three study areas were chosen -- neighborhoods with adult businesses, and three control areas -- neighborhoods without adult businesses which were paired to certain population and land use characteristics. The amount of property crimes, violent crimes, and sex offenses from the year 1978 are compared in each study and control area.

## THE STUDY AND CONTROL AREAS

Three different study areas containing adult businesses were selected to collect crime data. The east side of Central Avenue was chosen for the location of two study areas, while the west side has the third study area.

A control area has no adult business, but generally speaking, has similar population characteristics of a matched study area in terms of:

1. Number of residents
2. Median family income
3. Percentage of non-white population
4. Median age of the population
5. Percentage of dwelling units built since 1950
6. Percentage of acreage used residentially and non-residentially

Adult business locations are based on information furnished by the Department and verified by the Planning Department.

## CONCLUSIONS

Table V Property, Violent, and Sex Crimes in Selected Study Areas -- 1978 (was derived from information provided by the City of Phoenix Police Department's Crime Analysis synit and Planning and Research Bureau. The data from these two sections was compiled by adding the number by type of crimes committed in police grids, which are quarter mile neighborhoods. Crimes are based on arrest records and do not reflect ultimate convictions. It has been assumed that conviction rates will be proportional to arrest rates.) is a tabulation of the number of crimes committed and the rate of those crimes per 1,000 people living in each area. This table is on the following page.

There appears to be a significantly greater difference between the study and control areas for sex crimes than for either property or violent crimes. The following table illustrates a comparison of the ratio of the crime rate of the study area to the control area:

### TABLE VI

### CRIME RATES AS A PERCENTAGE OF STUDY AREA TO CONTROL AREA

| Study Area | Property Crimes | Violent Crimes | Sex Crimes | Sex Crimes (Less Indecent Exposure) |
|---|---|---|---|---|
| I | 147% | 144% | 1135% | 358% |

personnel also should recognize the complexity of this assignment and be receptive to requests for frequent in-service training programs. Once the obscenity problem has been effectively addressed law enforcement agencies should need only minimal manpower to maintain control.

RECOMMENDATION 30:

STATE AND LOCAL LAW ENFORCEMENT OFFICERS SHOULD TAKE AN

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| | | | | |
|---|---|---|---|---|
| II | 173 | 83 | 277 | 160 |
| III | 108 | 86 | 405 | 178 |
| Average: | 143% | 104% | 606% | 232% |

It is observed that there are about 40% more property crimes and about the same rate of violent crimes per 1,000 persons in the Study Areas as compared to the Control Area.

On the other hand there is an average of six times the sex crime rate in the Study Areas as compared with the Control Areas. Although the majority of sex crimes are Indecent Exposure, the fourth column illustrates that the remainder of the sex crimes also exhibit a significantly higher rate in the study areas. A detective from the police department stated that most indecent exposure crimes were committed on adult business premises. An example of this finding is in Study Area I. In that location, 89% of the reported indecent exposure crimes were committed at the addresses of adult businesses.

Where there is a concentration of adult businesses, such as in Study Area I, the difference in sex offense rates is most significant. As stated earlier in the report this location has four adult businesses which are less than 1000 feet away from each other and less than 500 feet away from a residential district. There is also a higher number of sex offenses committed -- 84 more crimes than in Study Area II, and 56 more crimes than in Study Area III. Similarly, when compared to its Control Area, the sex crime rate, per 1,000 residences is over 11 times as great in Study Area I. In the remaining study areas, which each contain a single adult business, their rates are four and almost three times as great.

ACTIVE ROLE IN THE LAW ENFORCEMENT COORDINATING COMMITTEES.

See, The discussion in the Recommendations for the United States Department of Justice in this Chapter.

RECOMMENDATION 31:

STATE AND LOCAL REVENUE AUTHORITIES MUST INSURE TAXES ARE COLLECTED FROM BUSINESSES DEALING IN OBSCENE MATERIALS.

"Adults Only" pornographic outlets often maintain separate business systems for accounting purposes. These operations may be in the form of a "front room" and a "back room."[300] The front room is usually where books, magazines, films, videos, and sexual devices are sold. The individual running the business usually keeps fairly accurate financial records for this part of the operation because revenues from it are used to pay rent, utilities, and employees' wages as well as purchase merchandise.[301]

The "back room" usually contains peep show booths or video machines which earn substantial profits--often twice that which the "front room" earns. These "back room" earnings are typically excluded from any financial records of the business and can easily go untaxed.[302] While this Commission does not condone the operation of pornography businesses it urges state and local revenue authorities to strictly scrutinize the reporting methods of these businesses and insure that the proper income is reported and subject to taxation.

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[300] New York Hearing, Vol. II, William Johnson, p. 72-73.

[301] Id. at 72.

RECOMMENDATION 32:

STATE AND LOCAL PUBLIC HEALTH AUTHORITIES SHOULD INVESTIGATE CONDITIONS WITHIN "ADULTS ONLY" PORNOGRAPHIC OUTLETS AND ARCADES AND ENFORCE THE LAWS AGAINST ANY HEALTH VIOLATIONS FOUND ON THOSE PREMISES.

DISCUSSION

Testimony before the Commission has revealed that sexual acts often occur in the peep booths located in many "Adults Only" pornographic outlets and arcades.[303] Acts such as fellatio, sodomy, and masturbation are common.[304] Some of these establishments have "glory holes" drilled through the walls of the peep booths to permit individuals to engage in anonymous sex with the occupant of the adjoining booth.[305] Upon examination of the interior of these booths, police often find evidence of urine, human feces and semen.[306]

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[302] Id. at 73.

[303] See, The discussion of the Production, Distribution and Technology of Sexually Explicit Materials in Part Four. Houston Hearing, Vol. I, W.D. Brown, p. 39; Chicago Hearing, Vol. II, Hinson McAuliffe, p. 181.

[304] Id.

The public health risks posed by this anonymous sexual activity are quite obvious. The public health department in Houston, Texas, reported 214 cases of syphilis and gonorrhea during three months of 1985.[307] Of those infected individuals, 10.7 percent reported they had performed sexual acts in "adult only" pornographic outlets.[308] Because of the anonymous nature of these sexual encounters, public health officials find it impossible to trace the origin of the disease.[309] Concern about the spread of Acquired Immune Deficiency Syndrome (AIDS) has made this situation even more significant. Similar risks to public health are posed by massage parlors, brothels, and establishments promoting "piercing"[310] and other sado-masochistic sexual activities.

While this Commission does not condone or support the existence of these businesses dealing in obscene materials, it urges state and local public health official to inspect the premises of adult bookstores and arcades in their jurisdictions and vigorously enforce the law against all public health violations found on those premises.

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[305] Houston Hearing, Vol. I, W.D. Brown, p. 41.

[306] Id. at 42.

[307] Id.

[308] Id.

[309] Id.

[310] "Piercing" is a form of sado-masochistic sexual activity involving the piercing of the skin or genitals with pins, needles, or other sharp instruments.

## G. RECOMMENDATIONS FOR THE JUDICIARY

### RECOMMENDATION 33:

**JUDGES SHOULD IMPOSE SUBSTANTIAL PERIODS OF INCARCERATION FOR PERSONS WHO ARE REPEATEDLY CONVICTED OF OBSCENITY LAW VIOLATIONS AND WHEN APPROPRIATE SHOULD ORDER PAYMENT OF RESTITUTION TO IDENTIFIED VICTIMS AS PART OF THE SENTENCE.**

The Commission has been apprised repeatedly of the minimal periods of incarceration and fines which have been imposed on person who frequently violate obscenity laws.[311] In cases involving significant violations of the obscenity laws or repeat offenders, only a substantial period of incarceration will provide a deterrent effect.[312]

Judges can also enhance basic law enforcement efforts when they impose substantial periods of incarceration for these offenses. Law enforcement officers, prosecutors and society in general view the sentences imposed as a statement of the community attitude toward the crime. When minimal sentences are given, the significance of the crime is diminished.

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[311] There were several defendants sentenced in a Federal Bureau of Investigation in a Spectra Photo. Even in cases involving severe sexual or physical abuse minimal sentences were imposed.

[312] See, Recommendation for Judicial and Correctional Facilities in this Chapter, for a further discussion of the goals of modern penology.

Recidivist obscenity law violators should be viewed the same as recidivist violators of other criminal laws. Judges also should be apprised of the nature of the materials involved and the offender's affiliation with organized crime, if any. These factors must be considered before a judge can appropriately sentence an offender.

## H. RECOMMENDATIONS FOR THE FEDERAL COMMUNICATIONS COMMISSION

Modern technology pervades virtually every aspect of daily life and it should come as no surprise that these advances are used in the dissemination of pornography. Two of these technological advances, Dial-A-Porn and cable television, have brought with them some very complex questions of law and public policy. In some instances, the course in resolving the issues remains largely uncharted. A complete discussion of pornography in the United States today cannot be addressed without a careful examination of these technologies particularly with reference to the role of the Federal Communications Commission in regulating them.

## RECOMMENDATION 34:

THE FEDERAL COMMUNICATIONS COMMISSION SHOULD USE ITS FULL REGULATORY POWERS AND IMPOSE APPROPRIATE SANCTIONS AGAINST PROVIDERS OF OBSCENE DIAL-A-PORN TELEPHONE SERVICES.

### DISCUSSION

The term "Dial-A-Porn" has been applied to describe two types of obscene statements made over the telephone as a part of a commercial transaction. In the first instance, the caller dials a number and talks to an individual who makes sexual remarks in response to the stated desires of the particular caller.[313] The caller pays a per minute rate and is billed on his or her credit card.[314] The conversation can last up to forty-five minutes.

The second type of transaction involves placing a call to a number with the "976" prefix. These numbers are part of the Mass Announcement Network Service (MANS) and provide the caller with a pre-recorded message similar to those giving the time of day or weather.315 The message is sexually explicit and the caller is charged on his monthly telephone statement.[316] The provider of the message receives a payment from telephone company revenues calculated according to the local tariff. The telephone company receives the remainder.[317] In some cities, for example, the cost to the caller is two dollars with $1.45 going to the provider of the message and fifty-five cents to the telephone company.[318]

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[313] Los Angeles Hearing, Vol. I, Brent Ward, p. 227.

[314] Id.

[315] Id. at 228.

These Dial-A-Porn recordings include graphic descriptions, complete with sound effects, of lesbian and homosexual acts, sodomy, rape, incest, excretion, bestiality, sadomasochism, and other unlawful, violent or dangerous sexual acts involving adults and children.[319] In May of 1983, 800,000 calls a day were placed to Dial-A-Porn numbers in New York.[320] Approximately 180,000,000 calls were made to the same numbers in the year ending in February 1984.[321]

Carlin Communications, a leading provider of Dial-A-Porn services, earned $3,600,000 in 1984.[322] Pacific Bell reports that sexually explicit messages represent twenty-seven percent of all "976" calls so far in 1985.[323] Telephone companies explain the existence of "976" service as an opportunity to provide subscribers with a wide range of information as well as a source of revenue to keep telephone rates low.[324] The content of the telephone messages is solely within the control of the provider. New Jersey Bell, however, has reserved the right to review program content under their contract with providers.[325] The easy accessability to Dial-A-Porn message has given rise to a number of problems. Initially it should be noted that the telephone companies have issued numbers, upon the request of the providers, such as 976-FOXX, 976-4LUV, and 976-LUST.[326] Dial-A-Porn advertising is often misleading in that it refers to "free phone sex" when, in fact, the caller is billed either on his or her credit card or is charged as part of their monthly telephone statement.[327]

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[316] Id. at 229-30.

[317] Id. at 229.

[318] Id.

[319] Id. at 231.

[320] Id. at 228.

[321] Id.

[322] Id. at 229.

Since Dial-A-Porn numbers are openly advertised in pornographic magazines, newsstand racks, in convenience grocery stores, on public billboards and other readily available publications they are often discovered and used by minors unbeknownst to their parents. The telephone company may elect to disconnect the customer's service if they do not pay the toll charges.[328] Finally, there is concern over the long-term effects of Dial-A-Porn recordings on children who listen to them and may attempt to model their behavior after them. This is especially worrisome when descriptions of unlawful, violent and incestuous acts are associated with sexual arousal as in many of the Dial-A-Porn messages.

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[323] Los Angeles Hearing, Vol. I, William Dunkle, p. 251.

[324] Id. at 150.

[325] Contract between New Jersey Bell and Sundial Productions. #C115185-2, (Dec. 21, 1982).

[326] Hollywood Press, Aug. 9, 1985.

[327] Los Angeles Hearing, Vol. I, Judith Trevillian, p. 264.

Two years ago, the Congress enacted legislation amending section 223 of the Communications Act of 1934.[329] This enactment prohibited the use of the telephone to make obscene or indecent communications for commercial purposes to anyone under eighteen years of age except where in compliance with regulations issued by the Federal Communications Commission. The FCC promulgated regulations making it an exception for the provider of a recorded message if the message was made available only between the hours of 9:00 p.m. and 8:00 a.m. eastern standard time or if the caller made prepayment by credit card in the case of a "live" message.[330] Carlin Communications challenged the FCC regulations.

On review, the United States Court of Appeals for the

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[328] Id.

[329] See, 47 U.S.C. S223(b)(1) et. seq.

[330] 49 Fed. Reg. 24, 996 (June 4, 1984).

Second Circuit found the regulations were invalid.[331] The court found that the government had a compelling interest in protecting minors from salacious material, but that the FCC regulations were not well tailored to meet their objectives, which could be achieved by less restrictive alternatives.[332] In dicta, the court said the FCC should have given more serious consideration to two other options such as "blocking" and access codes. Through "blocking" a subscriber can have access to all "976" numbers blocked from his telephone. Access codes could be issued to subscribers over eighteen who would have to dial the code in order to receive the sexually explicit message.[333]

On October 16, 1985, the FCC announced new regulations governing Dial-A-Porn.[334] Under the new regulations, Dial-A-Porn services must require either an authorized access or identification code or they must obtain prepayment by credit card before transmission of a sexually explicit message.[335]

Carlin challenged the new regulations, and on April 11, 1986, the Court of Appeals granted their petition and set aside the regulations as applied to Carlin.[336] The FCC now finds itself in a dilemma, since the latest set of regulations have been found unduly restrictive as applied to Carlin in New York, but possibly sustainable elsewhere.[337]

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[331] Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984).

[332] Id.

[333] Id.

[334] 50 Fed. Reg. 42699(Oct. 22, 1985).

[335] Id.

The Court of Appeals relied on statements from New York Telephone that access or identification codes are not technologically feasible in NYTS network,[338] and found that "the record does not support the FCC's conclusion that the access code requirement is the least restrictive means to regulate dial-a-porn. . . ."[339] The Court again referred to "blocking" as a less restrictive means of regulating Dial-A-Porn.[340] Blocking devices installed on the telephone customers' own terminal equipment could be used to block access to one or more pre-selected telephone numbers.[341] The court also suggested that the FCC should have considered the feasibility of passing along the cost of customer premises blocking equipment to the providers of Dial-A-Porn and/or the telephone companies.[342]

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[336] Carlin Communications, Inc. v. FCC, No. 85-4158(2d Cir. Apr. 11, 1986).

[337] Id. at 3-4.

[338] Id. at 11, 19. The Court noted that the access codes are probably technologically feasible in most other parts of the country. See, Id. at 4.

[339] Id. at 3.

[340] Id. at 23-24.

[341] Id. at 6-7.

The latest decision by the Second Circuit leaves the state of the law regarding dial-a-porn even more uncertain. The two attempts by the FCC to promulgate regulations in accordance with the federal statute have failed. The Court of Appeals found earlier that limitations on the hours that Dial-A-Porn messages may be offered were not tailored enough to regulate the problem.[343] Now the court has ruled that access codes are unduly restrictive as applied to Carlin in New York, but may be permissible elsewhere.[344] The "blocking" option advanced by the court has serious practical limitations. Blocking may not be available to all telephone customers.[345] Those who obtain the service would either lose access to all "976" numbers[346] or have to pre-select which numbers they wanted blocked.[347] Few parents would have sufficient knowledge of the multitude of Dial-A-Porn numbers to be able to pre-select them and prevent their children from calling them by use of a blocking device. And minors would still be free to make the calls from telephones not equipped with blocking devices.

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[342] Id. at 23.

[343] 749 F.2d at 121.

[344] Carlin Communications, Inc. v. FCC, supra, slip op. at 3-4.

[345] See, Los Angeles Hearing, Vol. I, William Dunkle, p. 254.

[346] Id.

[347] Carlin Communications, Inc. v. FCC, supra, slip op. at 6.

The provision of the federal statute permitting dial-a-porn messages to be provided in accordance with FCC regulations[348] has proven unworkable in addition to providing a "safe harbor" provision for Dial-A-Porn merchants. Congress should enact legislation that simply prohibits the transmission of obscene material through the telephone or similar common carrier.[349]

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[348] 47 U.S.C. S223(f)(2).

[349] In an attempt to address the Dial-A-Porn issue, Senate Bill 1090 has been introduced by Senators Jesse Helms, (R-NC), John East (R-NC) and Jeremiah Denton (R-Ala) to amend Section 223 of the Communications Act of 1934. The bill provides:

> Whoever - "(A) in the District of Columbia or in interstate or foreign communications, by means of telephone, makes (directly or by recording device) any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent, regardless of whether the maker of such comments placed the call or "(B) knowingly permits any telephone facility under such person's control to be used by any purpose prohibited by subparagraph (A). Shall be fined not more than $50,000 or imprisoned not more than six months, or both."

Additionally, Rep. Thomas J. Bliley (R-Va.) has introduced H.R. 4439 which would amend Section 223 of the Communications Act and eliminate the provision requiring the FCC to issue regulations:

H.R. 4439

> A bill to amend the Communications Act of 1934 to restrict the making of obscene and indecent communications by telephone.
>
> > "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembles,
>
> Section I, Short title.
>
> This Act may be cited as the "Telephone Decency Act of

The regulations that have been invalidated by the Second Circuit were based on the faulty premise that obscene telephone communications are entitled to some measure of protection so long as they occur between or among "consenting adults". The United States Supreme Court rejected this basic argument in Paris Adult Theatre I v. Slaton.[350] In Slaton, a motion picture theatre was convicted for showing obscene films.[351]

Its defense was that no one under twenty-one years of age was admitted and that showing the films to consenting adults was protected under the right to privacy.352 The Court affirmed the conviction, with Chief Justice Burger writing for the majority.

> We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding

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1986".
Section II, Amendments.
Section 223(B) of the Communications Act of 1934 is amended -
(1) in paragraph (1)(A), by striking out "under eighteen years of age or to any person without that person's consent";
(2) by striking out paragraph (2);
(3) in paragraph (4), by striking out "paragraphs (1) and (3)" and inserting in lieu thereof "paragraphs (1) and (2)"; and
(4) by redesignating paragraphs (3), (4), and (5) as paragraphs (2), (3), and (4), respectively.

[350] 413 U.S. 49 (1973).

[351] Id.

[352] Id.

> was properly rejected by the Georgia supreme court. Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, see Miller v. California, ante, at 18-20, Stanley v. Georgia, 394 U.S. at 567, Redrup v. New York, 386 U.S. 767, 769(1967), this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material.[353]

The Chief Justice went on to cite other legitimate interests which permitted the regulation of obscene material including maintenance of the "quality of life and the total community environment."[354] The Court also cited the statement of former Chief Justice Earl Warren in Jacobellis v. Ohio,[355] that, "there is a right of the Nation and the States to maintain a decent society."[356]

The telephone is also uniquely accessible to children. Children have easy and often unsupervised access to telephones in their homes and learn to use the telephone at an astonishingly early age. A child need only dial seven numbers to reach a recorded message. Additionally, Dial-A-Porn numbers are openly published and advertised in publications which are sold in racks on the public streets and available to purchasers of any age group. Dial-A-Porn numbers may also be passed along from one child to another.

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[353] Id. at 57.

[354] Id. at 58.

[355] 378 U.S. 184(1964).

[356] Id. at 199.

As a final consideration, the telephone industry, like broadcasting industry, is closely regulated. As a condition of its continued existence a carrier must act in the public interest. The FCC, whose entire regulatory scheme is based on serving the public interest could act to protect these same interests against obscene communications over the telephone if it chose to do so. The time is long overdue for the FCC to exercise its full regulatory powers with respect to this lucrative brand of obscenity.

RECOMMENDATION 35:

THE FEDERAL COMMUNICATIONS COMMISSION SHOULD USE ITS FULL REGULATORY POWERS AND IMPOSE APPROPRIATE SANCTIONS AGAINST CABLE AND SATELLITE TELEVISION PROGRAMMERS WHO TRANSMIT OBSCENE PROGRAMS.

The growth of the cable television industry over the last few years has been remarkable. Approximately forty percent of all homes in the country now have access to cable or satellite television, and 250,000 homes are being connected with the services every month.[357] There are currently 6,500 cable television systems serving forty million households.[358]

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[357] Citizens for Decency through Law, Memorandum (Jan., 1985).

The concerns over the content of some of cable television programming have increased as the cable industry has grown. Feature film presentations have been one of cable's strongest drawing cards and an increasing number of those films shown on cable fall under the MPAA rating "R".[359] These films depict nudity, sexual themes, simulated sex, graphic violence, or offensive language.[360] While a minor under the age of seventeen cannot be admitted into a theatre to view an "R" rated film without an accompanying parent or guardian, the same films are available to a viewer of any age over cable. Some of the premium channels offer movies that are unrated by the MPAA and go far beyond those in the "R" category and would be generally considered as "X-rated".

These films are sometimes the same films shown in pornography movie theatres and include films which federal and state courts have found to be obscene.[361] For example, the movie, "The Opening of Misty Beethoven" appeared over satellite television in Phoenix, Arizona, in 1981.[362] This film was previously found to be legally obscene by the Supreme Court of Alabama.[363]

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[358] Los Angeles Hearing, Vol. I, Brenda Fox, p. 284; Letter from James P. Mooney to Henry E. Hudson (May 2, 1986).

[359] See, Cable Pornography: Problems and Solutions, Citizens for Decency Through Law, 2(Jan. 1985).

[360] Los Angeles Hearing, Vol. II, Jack Valenti, p. 55k.

[361] Los Angeles Hearing, Vol. II, James J. Clancy, p. 309; Citizens for Decency Through Law, Memorandum, p. 2-3 (Jan. 1985).

[362] Los Angeles Hearing, Vol. II, James Clancy, p. 310.

These more sexually explicit movies earn a much larger profit for the cable channel.[364] It is less expensive for cable channel to offer these films than it is for them to acquire and show better known but non-sexually explicit feature films.

The cable industry minimizes any problems associated with sexually explicit cable programs. Brenda Fox of the National Cable Television Association (NCTA) testified in Los Angeles that there are only 700,000 subscribers to the "adult" programming offered on cable.[365] Ms. Fox also testified that the industry has taken what it regards as adequate steps to protect minors from viewing sexually explicit programs. These precautions include lockboxes so parents can control channel selection, program guides and notices, transmission of "adult" programs through scrambled signals and the restriction of this programming to later evening hours.[366] The number of hours of sexually explicit programming, however, continues to escalate. There is no reason that a cable television programmer or operator could not be prosecuted under existing federal and state obscenity laws by the United States Attorneys and State or local prosecutors for transmitting a program that meets the Miller test for obscenity.

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[363] Trans-Lux Theatre v. People ex rel. Sweeton, 366 So. 2d 710 (Ala. 1979).

[364] Citizens for Decency Through Law, Memorandum, p. 2-3 (Jan. 1985).

[365] Los Angeles Hearing, Vol. I, Brenda Fox, p. 295.

[366] Id. at 287-88.

As the Supreme Court held in Kaplan v. California, "[W]hen the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the expression."[367]

In HBO, Inc. v. Wilkinson, the United States District Court in Utah found the Miller standard applicable to Cable television. While a Miami, Florida, ordinànce prohibiting indecent cable telecasts was found to be unconstitutional, the portion of the ordinance that proscribed obscene programming was not challenged.[368]

The Cable Communications Policy Act of 1984 369 attempts to provide another avenue for the prosecution of obscenity shown over cable television. The Act provides, in part, that, "Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both."370

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[367] 413 U.S. 115, 118-19.

[368] Cruz v. Ferre, 755 F.2d 1415, 1418 (11th Cir. 1985).

[369] 47 U.S.C. S559.

[370] Id.

This portion of the section may be in conflict with two other sections of the Act governing editorial control of programming by cable operators. Sections 531(e) of Title 47 provides that:

> Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

Section 544(d) provides in part:

> (1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided *or shall be provided subject to conditions, if such cable services are obscene or* are otherwise unprotected by the Constitution of the United States.
>
> (2)(A) In order to *restrict the viewing of programming which is obscene* or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber. (emphasis added)

Section 544(d) seems to contemplate the operator providing obscene programming while Section 559 makes it a crime to do so.[371]

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[371] Senate Bill 1090 sponsored by Senator Jesse Helms (R-NC) would place a specific prohibition against obscene cable programming in section 1464 of Title 18 of the United States Code. The Helms bill provides in part:

> S1464. Distributing obscene material by radio or television "(a) Whoever utters any obscene, indecent, or profane material by means of radio or television, including cable television, shall be fined not more than $50,000 or imprisoned not more than two years, or both.

Proposed legislation should be drafted to enable United States Attorneys to prosecute violators under the criminal code and alleviate the possible conflict under the Cable Communications Policy Act.

The FCC has shown no interest in taking action regarding the contents of cable programming. Thomas Herwitz, legal assistant to FCC Chairman Mark Fowler, stated the Commission's views at the Los Angeles hearing regarding cable programming. The position the FCC has taken has been to advocate regulation for cable similar to that for the print medium.372

The FCC maintains that the cable subscription services can be controlled adequately within the home to assure that minors do not have access. The FCC position is that since the individual can act as his or her own gatekeeper and preclude those signals not desired to be watched, the government has no compelling interest in further intrusion.373

The posture adopted by the FCC has enabled cable television to occupy a status afforded no other medium. The

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"(b) As used in this section, the term 'distributes' means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire or satellite, or produce or provide such material for distribution.

[372] Los Angeles Hearing, Vol. I, Thomas Herwitz, p. 347.

[373] Id. at 348.

policy considerations that support government regulation of broadcasting to serve the public interest also apply to government regulation of cable television. As the United States Court of Appeals for the District of Columbia has ruled,

> [We] do require that at a minimum the [FCC], in developing its cable television regulations, demonstrate that the objectives to be achieved of regulating cable television are also objectives for which the commission could legitimately regulate the broadcast media.[374]

When 250,000 homes are being connected with cable every month, it is readily apparent that cable television's presence is, in fact, as pervasive as that of the broadcast media.

Parents may make the initial decision to subscribe to a cable service with a variety of program choices. The fact that a parent makes a conscious choice to engage the cable service does not impair the accessibility of the selections to minors in the home. Once cable enters the home it becomes the same in this regard as over the air broadcasts. It comes through the same television set and is usually accessed by the same controls. The FCC has recognized that,

> While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within this 'intended' audience may also see and hear portions of the broadcast.[375]

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[374] HBO v. FCC; 567 F.2d 9, 34(D.C. Cir. 1977).

[375] In Re, WUHY-FM, 24 FCC 2d 408(1970).

This rationale is equally applicable to cable and satellite television programs. In many homes, particularly single parent homes or homes where both parents work, close supervision and screening of the selection of television programs in reality may be either minimal or non-existent.

The cable television industry advocates lockboxes as a means of parental control over the programs viewed by children.[376] In their brief before the Supreme Court in FCC v. Pacifica, the Pacifica Foundation specifically raised the issue of lockbox controls. They contended that,

> . . . the material to which children are exposed on radio and television may be assumed to be subject to parental supervision to a far greater extent than much of the material to which children are likely to be exposed in other media. And, according to Broadcasting magazine, technology is now prepared to provide parents with a device which will permit them to "program" their home television set in advance so that it will only receive material selected by the parent, even in the parent's absence. Broadcasting, February 27, 1978, at 83.[377]

The addendum to the Pacifica Foundation's brief included a description and photograph of a lockbox device called a "Video Proctor" which is capable of being programmed by a parent to block out any VHF, UHF, cable, or pay television stations.[378] The Supreme Court was obviously unimpressed by the "lockbox" argument and upheld the FCC's authority to regulate broadcast content. Therefore, the availability of lockboxes does not prevent the FCC from regulating obscenity on radio and broadcast television. A lockbox performs the same function whether used to block out a broadcast or cable station. There is no reason why the availability of lockboxes should justify the FCC's failure to regulate obscene cable or satellite programming.

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[376] Los Angeles Hearing, Vol. I, Brenda Fox, p. 287-88.

[377] Brief Appellee, FCC v. Pacifica Foundation, 438 U.S. 726(1978)

The availability of program guides is also advanced as a means of parental control. However, program guides are also readily available for broadcast television programs in publications ranging from *TV Guide* to the daily newspaper. Programs guides offer no more protection in the context of cable and satellite television than they do in the realm of broadcast television.

While sexually explicit material may be transmitted by scrambled signals, this method is far from foolproof.

For two weeks in November of 1985, Tampa, Florida, residents received all of the "adult" channels whether they subscribed or not. This phenomenon apparently occurred because of a technological anomaly that was triggered by certain weather conditions.[379]

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[378] Addendum to Brief Appelle, *FCC v. Pacifica Foundation*, 438 U.S. 726(1978).

[379] *Tampa Tribune*, Nov. 8, 1985.

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In Colorado Springs, Colorado, the Playboy Channel "slipped through an electronic loophole" and supplemented a "Rin Tin Tin" movie on the Disney Channel.380 According to a Naples, Florida, resident, "adult" channels, even though scrambled, can still be heard and sometimes seen clearly enough to be watched.[381]

Finally, controls such as lockboxes, program guides, and scrambling are all based on the premise that consenting adults are entitled to observe what they want to. In Paris Adult Theatre I v. Slaton,[382] the United States Supreme Court held that obscene materials do not acquire constitutional immunity from state regulation simply because they are exhibited to consenting adults only.383

The time is long overdue for the FCC to take an active role in enforcing the laws and regulations against obscene cable programming.

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380 The Daily Sentinel, Aug. 13, 1984.

381 Statement by Rachel Sturdivant, Naples, Florida, submitted by Florida Coalition for Clean Cable.

382 413 U.S. 49 (1973).

383 Id. at 57.

## I. RECOMMENDATION FOR OTHER FEDERAL ORGANIZATIONS

**35. THE PRESIDENT'S COMMISSION ON UNIFORM SENTENCING SHOULD CONSIDER A PROVISION FOR A MINIMUM OF ONE YEAR IMPRISONMENT FOR ANY SECOND OR SUBSEQUENT VIOLATION OF FEDERAL LAW INVOLVING OBSCENE MATERIAL THAT DEPICTS ADULTS.**

The Commission has received considerable evidence with regard to the disparity in sentences obscenity law violators receive.[384] Congress has enacted the Sentencing Reform Act

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[384] DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS BY MAJOR OFFENSES FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1981

| MAJOR OFFENSE TITLE/SECTION AND LEVEL | | DEFENDANTS | IMPRISONMENT PRISON MONTHS | PROBATION MONTHS | FINE |
|---|---|---|---|---|---|
| 18 1461 | FELONY | 2 | 60 | | |
| 18 1461 | FELONY | 1 | 120 | 60 | 15,000 |
| 18 1461 | FELONY | 1 | 180 | 60 | 20,000 |
| 18 1461 | 9810 | | | | |
| 18 1462 | FELONY | 1 | 12 | | |
| 18 1462 | 9820 | | | | |
| 18 1462 | FELONY | | | | |
| 18 1462 | 9910 | | | | |
| 18 1465 | FELONY | 1 | 18 | 60 | 5,000 |
| 18 1465 | FELONY | 1 | 24 | | 15,000 |
| 18 1465 | 9820 | | | | |

| MAJOR OFFENSE | | | |
|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PROBATION<br>PROBATION MONTHS | FINE |
| 18 1461 FELONY | 1 | 24 | 5,000 |
| 18 1461 FELONY | 1 | 36 | |
| 18 1461 FELONY | 1 | 48 | |
| 18 1461 FELONY | 1 | 60 | |
| 18 1461 9810 | | | |
| 18 1462 FELONY | 2 | 24 | 500 |
| 18 1462 9820 | | | |
| 18 1464 FELONY | | | |
| 18 1464 9910 | | | |
| 18 1465 FELONY | 3 | 12 | |
| 18 1465 FELONY | 2 | 24 | |
| 18 1465 9820 | | | |

| MAJOR OFFENSE | | SPLIT SENTENCES | | |
|---|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PRISON MONTHS | PROBATION MONTHS | FINE |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 9810 | | | | |
| 18 1462 FELONY | 1 | 6 | 24 | |
| 18 1462 9820 | | | | |
| 18 1462 FELONY | | | | |
| 18 1462 9910 | | | | |
| 18 1465 FELONY | | | | |
| 18 1465 FELONY | | | | |

18 1465 9820

| MAJOR OFFENSE TITLE/SECTION AND LEVEL | DEFENDANTS | FINE ONLY AMOUNT | OTHER SENTENCES |
|---|---|---|---|
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 9810 | | | |
| 18 1462 FELONY | | | |
| 18 1462 9820 | | | |
| 18 1462 FELONY | | | |
| 18 1462 9910 | | | |
| 18 1465 FELONY | 3 | 15,000 | |
| 18 1465 FELONY | 1 | 200,000 | |
| 18 1465 9820 | | | |

## DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS BY MAJOR OFFENSES FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1982

| MAJOR OFFENSE TITLE/SECTION AND LEVEL | DEFENDANTS | IMPRISONMENT PRISON MONTHS | PROBATION MONTHS | FINE |
|---|---|---|---|---|
| 18 1461 FELONY | 1 | 60 | 60 | |
| 18 1461 FELONY | 1 | 108 | | |
| 18 1461 9810 | | | | |
| 18 1462 FELONY | 1 | 48 | | |
| 18 1462 FELONY | 1 | 60 | 60 | 12,500 |

|  |  |  |  |  |
|---|---|---|---|---|
| 18 1462 9820 |  |  |  |  |
| 18 1464 FELONY |  |  |  |  |
| 18 1462 9910 |  |  |  |  |
| 18 1465 FELONY | 1 | 18 | 60 | 5,000 |
| 18 1465 9820 |  |  |  |  |

| MAJOR OFFENSE TITLE/SECTION AND LEVEL | DEFENDANTS | PROBATION<br>PROBATION MONTHS | FINE |
|---|---|---|---|
| 18 1461 FELONY | 1 | 36 |  |
| 18 1461 FELONY | 1 | 60 |  |
| 18 1461 9810 |  |  |  |
| 18 1462 FELONY | 1 | 12 |  |
| 18 1462 FELONY | 2 | 12 | 1,000 |
| 18 1462 9820 |  |  |  |
| 18 1464 FELONY |  |  |  |
| 16 1464 9910 |  |  |  |
| 18 1465 FELONY | 3 | 12 |  |
| 18 1465 9820 |  |  |  |

| MAJOR OFFENSE TITLE/SECTION AND LEVEL | DEFENDANTS | SPLIT SENTENCES<br>PRISON MONTHS | PROBATION MONTHS | FINE |
|---|---|---|---|---|
| 18 1461 FELONY | 1 | 3 | 36 | 1,000 |
| 18 1461 FELONY |  |  |  |  |
| 18 1461 9810 |  |  |  |  |
| 18 1462 FELONY |  |  |  |  |
| 18 1462 FELONY |  |  |  |  |

| | | | | |
|---|---|---|---|---|
| 18 1462 | 9820 | | | |
| 18 1464 | FELONY | 1 | 6 | 60 |
| 18 1462 | 9910 | | | |
| 18 1465 | FELONY | | | |
| 18 1465 | FELONY | | | |
| 18 1465 | 9820 | | | |

| MAJOR OFFENSE | | | FINE ONLY | |
|---|---|---|---|---|
| TITLE/SECTION AND LEVEL | | DEFENDANTS | AMOUNT | OTHER SENTENCES |
| 18 1461 | FELONY | | | |
| 18 1461 | FELONY | | | |
| 18 1461 | 9810 | | | |
| 18 1462 | FELONY | 1 | 5,000 | |
| 18 1462 | 9820 | | | |
| 18 1462 | FELONY | | | |
| 18 1462 | 9910 | | | |
| 18 1465 | FELONY | 1 | 20,000 | |
| 18 1465 | 9820 | | | |

## DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS BY MAJOR OFFENSES FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1983

| MAJOR OFFENSE | | | IMPRISONMENT | | |
|---|---|---|---|---|---|
| TITLE/SECTION AND LEVEL | | DEFENDANTS | PRISON MONTHS | PROBATION MONTHS | FINE |
| 18 1461 | FELONY | 1 | 60 | 60 | 5,000 |
| 18 1461 | FELONY | 1 | 108 | | |
| 18 1461 | FELONY | | | | |
| 18 1461 | FELONY | | | | |

18 1461 FELONY

| MAJOR OFFENSE | | PROBATION | |
|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PROBATION MONTHS | FINE |
| 18 1461 FELONY | 1 | 24 | 1,000 |
| 18 1461 FELONY | 2 | 36 | |
| 18 1461 FELONY | 1 | 36 | 1,500 |
| 18 1461 FELONY | 1 | 36 | 2,000 |
| 18 1461 FELONY | 2 | 48 | |

| MAJOR OFFENSE | | SPLIT SENTENCES | | |
|---|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PRISON MONTHS | PROBATION MONTHS | FINE |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |

| MAJOR OFFENSE | | FINE ONLY | |
|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | AMOUNT | OTHER SENTENCES |
| 18 1461 FELONY | 1 | 5,000 | |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |

## DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS BY MAJOR OFFENSES FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1984

| MAJOR OFFENSE | IMPRISONMENT |
|---|---|

| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PRISON MONTHS | PROBATION MONTHS | FINE |
|---|---|---|---|---|
| 18 1461 FELONY | 1 | 36 | | |
| 18 1461 FELONY | 1 | 60 | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1462 FELONY | | | | |
| 18 1465 FELONY | | | | |
| 18 1465 FELONY | 1 | 24 | | |
| 18 1465 FELONY | 1 | 36 | | |

| MAJOR OFFENSE | | PROBATION | |
|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PROBATION MONTHS | FINE |
| 18 1461 FELONY | 1 | 24 | |
| 18 1461 FELONY | 1 | 36 | |
| 18 1461 FELONY | 4 | 60 | |
| 18 1461 FELONY | | | |
| 18 1462 FELONY | | | |
| 18 1462 9820 | | | |
| 18 1465 FELONY | 1 | 12 | |
| 18 1465 FELONY | | | |
| 18 1465 9820 | | | |

| MAJOR OFFENSE | | SPLIT SENTENCES | | |
|---|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PRISON MONTHS | PROBATION MONTHS | FINE |
| 18 1461 FELONY | | 3 | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 9810 | | | | |

|  |  |  |  |  |
|---|---|---|---|---|
| 18 1462 | FELONY | 1 | 6 | 24 |
| 18 1462 | 9820 |  |  |  |
| 18 1462 | FELONY |  |  |  |
| 18 1462 | 9910 |  |  |  |
| 18 1465 | FELONY |  |  |  |
| 18 1465 | FELONY |  |  |  |
| 18 1465 | 9820 |  |  |  |

| MAJOR OFFENSE |  | FINE ONLY |  |  |
|---|---|---|---|---|
| TITLE/SECTION AND LEVEL |  | DEFENDANTS | AMOUNT | OTHER SENTENCES |
| 18 1461 | FELONY | 1 | 15,000 |  |
| 18 1461 | FELONY |  |  |  |
| 18 1461 | FELONY |  |  |  |
| 18 1461 | FELONY |  |  |  |
| 18 1461 | 9810 |  |  |  |
| 18 1462 | FELONY |  |  |  |
| 18 1462 | 9820 |  |  |  |
| 18 1462 | FELONY |  |  |  |
| 18 1462 | 9910 |  |  |  |
| 18 1465 | FELONY | 3 | 15,000 |  |
| 18 1465 | FELONY | 1 | 200,000 |  |
| 18 1465 | 9820 |  |  |  |

## DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS BY MAJOR OFFENSES FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1985

| MAJOR OFFENSE | IMPRISONMENT |
|---|---|

| TITLE/SECTION AND LEVEL | DEFENDANTS | PRISON MONTHS | PROBATION MONTHS | FINE |
|---|---|---|---|---|
| 18 1461 FELONY | 1 | 6 | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 9810 | | | | |
| 18 1462 FELONY | | | | |
| 18 1462 9820 | | | | |
| 18 1464 FELONY | | | | |
| 18 1464 9910 | | | | |
| 18 1465 FELONY | | | | |
| 18 1465 FELONY | | | | |
| 18 1465 9820 | | | | |

| MAJOR OFFENSE | | PROBATION | |
|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFENDANTS | PROBATION MONTHS | FINE |
| 18 1461 FELONY | 2 | 24 | |
| 18 1461 FELONY | 3 | 36 | |
| 18 1461 FELONY | 3 | 48 | |
| 18 1461 FELONY | 4 | 60 | |
| 18 1461 9810 | | | |
| 18 1462 FELONY | 1 | 36 | |
| 18 1462 9820 | 3 | 60 | |
| 18 1464 FELONY | | | |
| 18 1464 9910 | | | |
| 18 1465 FELONY | | | |
| 18 1465 FELONY | | | |
| 18 1465 9820 | | | |

| MAJOR OFFENSE | | SPLIT SENTENCES | | |
|---|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | PRISON MONTHS | PROBATION MONTHS | FINE |
| 18 1461 FELONY | 5 | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 FELONY | | | | |
| 18 1461 9810 | | | | |
| 18 1462 FELONY | | | | |
| 18 1462 9820 | | | | |
| 18 1462 FELONY | | | | |
| 18 1462 9910 | | | | |
| 18 1465 FELONY | 1 | | | |
| 18 1465 FELONY | | | | |
| 18 1465 9820 | | | | |

| MAJOR OFFENSE | | FINE ONLY | |
|---|---|---|---|
| TITLE/SECTION AND LEVEL | DEFEND-ANTS | AMOUNT | OTHER SENTENCES |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 FELONY | | | |
| 18 1461 9810 | | | |
| 18 1462 FELONY | | | |
| 18 1462 9820 | | | |
| 18 1462 FELONY | | | |
| 18 1462 9910 | | | |

of 1984.

The President's Commission on Uniform Sentencing is a result of this Act.[385] According to the Department of Justice,

> The principal goal of the Sentencing Reform Act is to establish a uniform, determinate federal sentencing system that will accomplish the purpose of just punishment, deterrence, incapacitation, and rehabilitation. This goal is to be achieved primarily through the use of sentencing guidelines established by a Presidentially appointed Sentencing Commission, which will be composed of seven full time members and a staff. At least three members must be active federal judges who will not be required to resign from the bench to serve on the Commission. The initial set of guidelines is to be completed in eighteen months. In the course of its work, the Commission will examine the offense and offender characteristics that judges now consider in making sentencing determinations, and will determine which of those should be reflected in the guidelines, which ones occur so infrequently that they should not be considered in the guidelines but might justify a departure from the guidelines, and which ones should not affect the sentence at all.[386]

In addition, the President's Commission on Uniform Sentencing should specifically consider the problems associated with sentencing obscenity law violations.

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| | |
|---|---|
| 18 1465 | FELONY |
| 18 1465 | FELONY |
| 18 1465 | 9820 |

SOURCE: ADMINISTRATIVE OFFICES OF THE UNITED STATES COURTS.

[385] United States Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and other Criminal Statutes Enacted by the 98th Congress 31 (1984).

[386] *Id.*

## Chapter 3

## Child Pornography

No clearer measure exists of the radical shift in the issues confronted by the Commission on Obscenity and Pornography in 1970 and those facing this one than the problem of child pornography. In its description of "the industries" producing sexually explicit material the 1970 Commission nowhere mentioned or alluded to child pornography,[387] and its Traffic and Distribution Panel reported that "[t]he taboo against pedophilia . . . has remained almost inviolate" even in the hardest of "hard-core" materials.[388] The recommendations of the 1970 Commission included repeal of all laws restraining distribution of sexually explicit materials to children; no exception was stated for materials depicting children engaged in sexual conduct.[389]

This Commission, by contrast, has devoted a very substantial proportion of its time and energy to examining the extent and nature of child pornography. Indeed, one set of the Commission's hearings was devoted almost entirely to the problem, while extensive oral and written testimony on the subject was received throughout the year. No aspect of the pornography industry has more occupied the attention of Congress and the general public during the past decade, and this Commission has made a wide range of recommendations for further legislative and public action. The very novelty of child pornography as a matter for public concern, however, requires at least a general overview of the rise of the "kiddie porn" industry, the nature of and the rationale for the governmental response to it, the effects on the children involved, and the contours of the industry's surviving components. That overview must begin with attention to what "child pornography" by definition is and what it is not.

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[387] Report of the Commission on Obscenity and Pornography 7-23 (1970)

[388] Id. at 139.

[389] Id. at 57-67.

Drawings of children engaged in sexual intercourse with adults date at least from ancient Greece,390 and a graphic written description of child sexual abuse was to be found in seventeenth century France.391 Yet although these portrayals or accounts might be deemed "obscene," and although they deeply offend modern sensibilities regarding the rearing and protection of children, they are not "child pornography" in the specific legal and clinical sense that term has acquired over the past fifteen years. As defined by the United States Supreme Court in the 1982 decision, New York v. Ferber, the category of "child pornography" is "limited to works that visually depict sexual

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390 See, Photographic vase drawings in K. J. Dover, Greek Homosexuality (1978).

391 See, description of P. Aries, Centuries of Childhood 100-102 (1962) (diary of Heroard, physician to Henri IV, who set down graphic details of sexual "play" with the child Louis XIII).

conduct by children below a specified age."[392] It is clear from the Court's language, and in all statutory and scholarly definitions of the term, that "child pornography" is only appropriate as a description of material depicting *real* children.[393]

The basis for these limitations is evident from the very nature of the outrage child pornography engenders - anger over the sexual abuse of children used in its production. While concern over "pornography" generally has centered on the impact of sexually explicit materials on the *audience*, "child pornography" has been defined, and attacked, in terms of its effects on the children who appear in it. Thus, as the Court found in *Ferber*, the category of "child pornography" is both broader and narrower than that of "obscenity." Broader in that it includes materials which are not "patently offensive," which do not appeal to the "prurient interest of the average individual, "and which show children in sexual conduct even as an incidental part of the work (rather than "taken as a whole").[394] Narrower, however, in that written materials are wholly excluded, as are visual materials which do not show actual children engaged in sexual conduct. Thus a rewrite of Lolita which included graphic descriptions of sexual activity with a young girl could never be "child pornography," nor could a fully explicit film of the novel which starred an adult actress playing the part of the young girl. Such a film which used a minor actress, however, could be "child pornography" even if not "patently offensive" by prevailing community standards, and (although this is less clear) even if it possessed serious artistic, literary, scientific or educational value.[395] In the context of "child pornography," alone among all the issues considered by the Commission, the defninition of "obscenity" proclaimed in Miller v. California[396] and its progeny is wholly irrelevant. Indeed, the advent of "kiddie porn" in the years after Miller provides vivid illustration of the inadequacy of the concept of "obscenity" for protecting the interests of performers in sexually explicit material.[397]

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[392] 458 U.S. 474, 746 (1982). The Court also required that the "category of 'sexual conduct' proscribed must also be suitable limited and described," *id.*, and must not include mere "nudity." *Id.* at 765 n. 18. The New York statutes in question, Penal Law 263.15, was found to fit these requirements even though it included "lewd exhibition of the genitals" in its definition of proscribed sexual conduct. *Id.* at 773.

[393] The *Ferber* Court began its analysis of "child pornography" by noting the judgment of legislators and clinicians that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," a judgment the Court found "easily passes muster under the First Amendment." *Id.* at 758. *Ferber* thus rests squarely on the assumption that the materials in question are limited to those in the production of which *actual* children have been used.

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[394] Id. at 764.

[395] Thus the Court found that "a work which, taken as a whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography." Compare, id at 774-775 (O'Connor, J., concurring) (no defense based on "serious value" should be allowed) with id., at 775-777 (Brennan, J., concurring in the judgement) (such a defense required by First Amendment).

[396] 413 U.S. 15 (1973).

The irrelevance of Miller to child pornography is loaded with some historic ironies, for it was later in the very year of that decision, 1973, that the first child pornography ring - involving some fourteen adults using boys under age thirteen for sex and production of pornographic materials - was brought to public view.[398] In the four years that followed police and reporters uncovered a wide range of activities involving the sexual exploitation of children, much of it involving child pornography.[399] Early in 1976 two employees of a large Los Angeles corporation publishing sexually explicit magazines were convicted of pandering for hiring a fourteen-year-old girl to engage in numerous acts of photographed sexual intercourse for publication in the company's magazines.[400] Later in that year the Los Angeles Police Department established a special Sexually Exploited Child Unit to combat child pornography and prostitution,[401] and in the spring of 1977 a string of investigative articles in the *Chicago Tribune*, *Time* and other major publications helped prompt a full Congressional investigation of the problem.[402]

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[397] For the full discussion of the problem of the use of adult performers in commercial pornography, See, Chapter 2 in Part Five.

[398] S. O'Brien, Child pornography 60 (1983) (arrests by Los Angeles police). In August of 1973 the sexually sadistic murder of twenty-seven young boys by Dean Corll was uncovered, while several other call-boy rings were also exposed that year.

[399] See R. Lloyd, For Money or Love: Boy Prostitution in America (1977); C. Linedecker, Children in Chains 212-242 (1981).

[400] People v. Fixler, 128 Cal. Rptr. 363, 56 Cal. App. 3d 321 (2d Dist. 1976).

What Congress discovered in its hearings - which involved one Senate and two House subcommittees over ten dates and four cities from May to September of 1977[403] - was summarized by the Senate Judiciary Committee in its report:

> [C]hild pornography and child prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale. . . .[404]

According to evidence at the hearings, those industries were producing some 264 different commercial magazines each month showing children nude or engaged in sexual conduct,[405] and the founder of the Los Angeles Sexually Exploited Child Unit reported that "We have 30,000 sexually exploited children in that city."[406] One producer and distributor was reported to have made five to seven million dollars in his own child-pornography business,[407] while other witnesses before Congress described the kidnapping of small children by pornographers,[408] and even their sale by parents.[409]

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[401] *Sexual Exploitation of Children, Hrgs. Before the Subcomm. on the Judiciary, U.S. House, 95th Cong., 1st Sess.* 63 (1977) (statement of Investigator Lloyd Martin, Los Angeles Police Dep't) (hearings hereinafter referred to as "Subcommittee on Crime Hearings").

[402] For a reprint of the most influential articles *See*, *Subcommittee on Crime Hearings*, *supra* note 401, at 422-443.

[403] *Subcommittee on Crime Hearings*, *supra* note 401; *Sexual Exploitation of Children, Hrgs. Before the Subcomm. on Select Education, Comm. on Education and Labor, U.S. House, 95th Cong., 1st Sess.* (1977) (hereinafter "Select Education Subcommittee Hearings"); *Protection of Children Against Sexual Exploitation, Hrgs. Before the Subcomm. to Investigate Juvenile Delinquency, Comm. on the Judiciary, U.S. Senate, 95th Cong., 1st Sess.* (1977) (hereinafter "1977 Senate Hearings").

[404] S. Rep. No. 438, 95th Cong., 1st Sess. 5 (1977).

Child pornography had, in short, become a part of the commercial mainstream of pornography by 1977, sold "over the counter" and in considerable quantities. While a substantial amount of such material was of foreign origin,[410] much of it was made using American children. This wholly unanticipated by-product of the "pornography boom" prompted an angry legislative response from Congress and nearly all state legislatures - a response that in itself seems to have reshaped completely the nature of the child-pornography industry.

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[405] *Subcommittee on Crime Hearings*, *supra* note 402, at 43 (testimony of Dr. Judianne Denses-Gerber, Presl, Odyssey Institute).

[406] *Id*. at 59 (testimony of Lloyd Martin).

[407] *Id*. at 117 (statement of Michael Sneed, reporter, *Chicago Tribune*).

[408] *Select Education Subcommittee Hearings*, *supra* note 403, at 116. (statement of Robin Lloyd).

[409] *Id* at 42-43 (testimony of Lloyd Martin).

[410] For an excellent overview of the production of child pornography in the Netherlands, Denmark, and other northern European countries - as well as the repackageing for shipment to the United States of material originally produced in America-see, *Child Pornography and Pedophilia*, *Hrgs. Before the Perm. Subcommittee on Investigations, Comm. on Governmental Affairs, U.S. Senate, 98th Cong., 2d Sess; Part 1 (1984)* (especially testimony of Kenneth J. Herrmann, Jr., and Michael Jupp, and Toby Tyler, *id*. at 322-37); and *Child Pornography and Pedophilia, Hrg. Before the Perm. Comm. on Investigations, Comm. on Governmental Affairs, U.S. Senate, 99th Cong., 1st Sess., Part 2 (1985)* (especially testimony of Elliott Abrams, *et al.*, members of federal interagency group which travelled to Denmark, The

The governmental battle against sexual exploitation of children has been an ongoing, evolutionary one, marked by an extraordinary degree of consensus among legislators on both the federal and state levels. Detailed analysis of the wide array of statutes which have resulted from this shared concern is beyond the scope of this report. Nevertheless, a general review of applicable federal statutes, long with attention to significant features of current states, is a crucial backdrop to the Commission's recommendations, and, more importantly to understanding the substantial changes in the child-pornography industry since 1977.

Federal Statutes. Comparison of the two major Congressional acts designed to fight sexual exploitation, approved six years apart, provides perhaps the best evidence of how a changing child pornography industry has taxed legislative ingenuity:[411]

1. The Protection of Children from Sexual Exploitation

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Netherlands, and Sweden to discuss problem of child pornography with government officials) (hearing hereinafter referred to as "1985 Hearings").

[411] For a more complete discussion and comparison of the relevant federal statutes, see, Loken, The Federal Battle Against Child Sexual Exploitation: Proposals for Reform, Harv. Women's L.J. (1986).

Act of 1977 (the "1977 Act").[412] The immediate response of Congress to the evidence gathered in its 1977 investigations was this law, approved February 6, 1978.

It categorically prohibited the production of any "sexually explicit" material using a child under age sixteen, if such material is destined for, or has already travelled in interstate commerce.[413] The definition of the phrase "sexually explicit" included any conduct involving sexual intercourse of any variety, bestiality, masturbation, sado-masochistic abuse, or "lewd exhibition of the genitals or pubic area."[414] Stern penalties (10 years imprisonment and/or $10,000 fine) were imposed for violating these provisions,[415] and were made applicable, as well, to parents or other custodians who knowingly permit a child to participate in such production.[416]

With regard to the traffic in child pornography already produced, the 1977 Act took a somewhat different approach. With the evidence gathered at the hearings centering overwhelmingly on the commercial character of such traffic, Congress understandably directed its prohibitions against the transportation, shipping, mailing, or receipt of child pornography in interstate commerce

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[412] P.L. 95-225, 92 Stat. 7 (1978), codified at 18 U.S.C.S. SS2251-2253 (1979).

[413] 18 U.S.C.S. S2251(a) (1979).

[414] 18 U.S.C.S. S 2253 (1979).

[415] 18 U.S.C.S. S2251(c) (1979).

[416] 18 U.S.C.S. S2251(b) (1979).

"*for the purpose of sale* or distribution *for sale*."[417] Th bartering or simply giving away child pornography was n prohibited even if conducted through the mail. Further, const tutional concerns led Congress to restrict the application these provisions to material depicting children engaged "sexually explicit" activity, which was also "obscene" under t *Miller* test.[418] As under the production provisions, the a limit for children protected was set at sixteen, and t penalties imposed were identical.[419]

2. *The Child Protection Act of 1984 (the "1984 Act")*.[420] Strong as it appeared to be on its face, the 1977 Act was soo found by federal law enforcement officials to be of only limite practical value. The production of child pornography is s clandestine in character that from 1978 to 1984 only one perso had been convicted under that portion of the 1977 Act.[421] As fo distribution of the material, the traffic in child pornograph went underground after 1978, and commercial magazines such a those shown to Congress in 1977 were no longer available "over-the-counter" in pornography outlets. Rather, as a Posta

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[417] 18 U.S.C.S. S2252 (1979).

[418] *Id.*

[419] *Id.*

[420] P.L. 98-292, 98 Stat. 204 (1984), *codified* at 1 U.S.C.S. SS 2251-2255 (1985 Supp.). The constitutionality of thi act has recently been sustained by two different federal courts *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985).

[421] 1985 Hearing, *supra* note 410, at 104 (statement Victoria Toensing, Dep'y Asst. Attorney General).

official told Congress in 1982, the "bulk of child pornography traffic is noncommercial."[422] This meant, as an Federal Bureau of Investigation witness told the same hearing, that federal enforcement of the 1977 Act was "seriously impaired" by its "for sale" requirements.[423] Further, the limitation of the trafficking provision of the 1977 Act to "obscene" child pornography placed substantial obstacles in the path of prosecutors.[424]

Confronted by this evidence, and reinforced by the Ferber decision removing any doubt about the necessity of "obscenity" limitations, Congress in May, 1984, approved a broad revision of the 1977 Act. The Child Protection Act of 1984 removed the requirement that interstate trafficking, receipt, or mailing of child pornography be for the purpose of "sale" to be criminal.[425] Further, it wholly eliminated the "obscenity" restrictions of the 1977 Act,[426] and raised the age limit of protection to eighteen.[427] Provisions raising the amount of potential fines were included,[428] along with new sections authorizing crimina and civil forfeiture actions against violators.[429] Th definition of "sexually explicit" material was adjusted slightly the first word in "lewd exhibition of the genitals or pubic area was changed to "lascivious," and "sadistic or masochistic abuse was substituted for "sado-masochistic abuse."[430] Writte materials, finally, were clearly excluded from the law's reach i this area: only "visual depictions" of children are criminall actionable.[431]

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[422] Exploited and Missing Children, Hrg. Before the Subcomm. on Juvenile Justice, Comm. on the Judiciary, 97th Cong., 2nd Sess. 47 (statement of Charles P. Nelson).

[423] Id. at 39 (statement of Dana E. Caro).

[424] Child Pornography, Hrg. Before the Subcomm. on Juvenile Justice, Senate Comm. on the Judiciary, 97th Cong., 2nd Sess. (1982) (statement of Robert Pitler, Bureau Chief, Appeals Bureau, District Attorney's Office for New York County).

[425] 18 U.S.C.S S2252(a) (1979).

[426] Id.

[427] 18 U.S.C.S. S2255 (1) (1979).

The result of these revisions was a dramatic increase i federal prosecutions. In the first nine months after passage o the 1984 Act virtually the same number of people were indicte for federal child pornography offenses as had been indicted during the previous six years.[432] The production provisions, however, continued to produce few indictments, in part because of the extraordinary difficulties of investigation and proof, and in part, perhaps, because the more easily used trafficking provisions often may be invoked against suspected producers instead.

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[428] 18 U.S.C.S. SS2251, 2252 (1979).

[429] 18 U.S.C.S. SS2253, 2254 (1979).

[430] 18 U.S.C.S. S2255 (1979).

[431] 18 U.S.C.S. SS2251, 2252 (1979).

[432] 1985 Hearing, *supra* note 410, at 104 (Victori Toensing). Statistics provided to the Commission by the Department of Justice indicate that 183 of the 255 indictments under federal child pornography laws from 1978 to February 27, 1986, were obtained *after* passage of the 1984 Act on May 21, 1984.

It appears, in any case, that the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry.

State Laws. The federal interest in protecting children, of course, is secondary to that of the states, which act as principal guardians against the abuse or neglect of the young. It was indeed a state law substantially broader than the 1977 Act which prompted the landmark decision in New York v. Ferber.[433] States are not limited, as is the federal government, to regulation of child pornography in or affecting interstate commerce; they have the power to prohibit all production and trafficking in such materials.

To a substantial extent the states have exercised that power. Nearly all ban the production of child pornography, and an overwhelming majority prohibit distribution as well.[434] Most prohibit as well parental consent or accession to use of children in sexually explicit materials, and many outlaw facilitation of sexual exploitation through financing, developing, duplication, or promoting child pornography.[435] Some have prohibited as well the possession of child pornography, an extremely effective weapon against child molesters.[436]

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[433] The law in question was N.Y. Penal Law S263.15.

[434] Nat'l Legal Resources Center for Child Advocacy and Protection, A.B.A., Child Sexual Exploitation: Background and Legal Analysis 35 (1984) (49 states as of November 1984) (hereinafter "A.B.A. Analysis").

[435] Id. at 36.

Yet it is clear, too, that much remains to be accomplished on the state level. Not all states ban trafficking in child pornography, so that it remains possible in some parts of this country to distribute such materials intrastate without fear of criminal penalty. Further, only about half of the states protect children from use in pornography until their eighteenth birthday; in other states the age limit is set at sixteen or seventeen.[437] (This Commission has determined, indeed, that such protections should, on a somewhat more limited basis, be extended to age twenty-one.)[438] Finally, few states appear to have taken action to provide substantial assistance to *victims* of child pornography - either through direct aid or through encouraging private civil remedies.[439] The primary role of states in caring for children would seem to argue for their assumption of the principal share of the burden of providing such assistance.

The legislative assault on child pornography drastically curtailed its public presence; it has not, however, ended the problem. Sexual exploitation of children has retreated to the shadows, but no evidence before the Commission suggests that children are any less at risk than before. The characteristics of both perpetrators and victims, combined with the extremely limited state of professional understanding, make it unlikely that child pornography is a passing phenomenon.

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[436] Thus Special Agent Kenneth Lanning of the F.B.I. noted in his testimony before the Commission that "pedophiliacs" almost always *collect* child pornography and/or child erotica." Miami Hearing, Vol. I., Kenneth Lanning, p. 232.

[437] A.B.A. Anaylsis, *supra* note 434, at 37.

[438] *See*, The discussion in this Chapter for Recommendations for Federal Legislation, *infra*.

[439] As an example of the difficulty of obtaining for children victimized in sexually explicit material *see*, *Faloona v. Hustler Magazine*, 607 R. Supp. 1341 (D.C. Tex. 1985), *appeal docketed*, No. 85-1359 (5th Cir. 1985).

Those who sexually exploit children do so for a wide range of reasons, and come from an extremely broad array of backgrounds, and occupations,[440] but it seems helpful to group them into two categories: "situational" and "preferential" molesters.[441] The former are people who act out of some serious sexual or psychological, need, but choose children as victims only when they are readily and safely accessible. "Preferential" molesters, on the other hand, are those with a clear sexual preference for children ("pedophiles" in common usage) who can only satisfy the demands of that preference through child victims. "Preferential" abusers collect child pornography and/or erotica almost as a matter of course. It is unclear how large each of these respective categories is, but it does seem apparent that "preferential" child molesters over the long term victimize far more children than do "situational" abusers.

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[440] Washington Hearing, Vol. I, Daniel Mihalko, p. 149; Belanger, et al., Typology of Sex Rings Exploiting Children, in Child Pornography and Sex Rings 74 (A. Burgess ed. 1984) (hereinafter "Sex Rings").

[441] For these categories and the analysis that follow from them the Commission is grateful to Special Agent, Kenneth Lanning, F.B.I.

The approaches adopted by various perpetrators also vary widely. The most recent research on "child sex rings" indicates that they range in structure from highly organized, "syndicated" operations involving several perpetrators and many children with production of child pornography for sale or barter, to "solo" operations in which children are abused and photographed by only one perpetrator for his pleasure.[442] Child pornography, while serving primarily the perpetrator's own needs, is also useful for lowering the inhibitions of other children being recruited by the perpetrator.[443] Wholly commercial operations appear to be extremely unusual, but are still not unknown.[444]

The normal absence of commercial motives, and the strong sexual and/or psychological needs which push both situational and preferential molesters toward sexual abuse of children in pornography, suggest that the demand for such material may be somewhat inflexible. While situational abusers may be steered away from children as victims, preferential abusers may not - and they are prone, moreover, to far more frequent abuse. However strong the criminal law, sexual exploitation of children seems likely to remain an irresistable temptation for some.

What is worse, the supply of potential victims seems inexhaustible as well. Children used in pornography seem to come from every class, religion, and family background; a majority are exploited by someone who knows them by virtue of his or her occupation,[445] or through a neighborhood, community or family relationship. Many are too young as to know what has happened; others are powerless to refuse the demand of an authority figure; some seem to engage in the conduct "voluntarily," usually in order to obtain desperately needed adult affection.446 Adolescents used in pornography are often runaways, homeless youth or juvenile prostitutes who may feel with some justice that they have little choice but to participate.[447] Thus it seems clear that a large class of children and teenagers vunerable to use in pornography will continue to exist. Even redoubled efforts to teach children to protect themselves from such involvement will not wholly blunt the strong social, family, and economic forces creating that vulnerability.

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[442] Belanger, supra note 441, at 51.

[443] Lanning, Collectors, in Sex Rings, supra note 440, at 86.

[444] See, Sex Rings, supra note 440 at 67-73, 78 (seventeen of fity-four child sex rings studied were "syndicated", most of which sold child pornography and used children in prostitution).

The rise of the child pornography "problem" took medical, social services and legal communities as much by surprise as it did Congress and the general public. It is only fair to note, therefore, that what one witness dubbed "conceptual chaos" is a serious obstacle to progress against sexual exploitation of children in pornography;[448] at present only a tiny quantity of serious scholarship on the subject has found its way into print.[449] There are indications, moreover, that researchers and clinicians attempting to specialize in the field have faced serious resistance from their peers.[450]

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[445] Id. at 74-75 (38.2 percent of offenders studied had access to children through occupation; 27.3 percent through their "living situation").

[446] U. Schoettle, Report to the United States' Attorney General's Comm'n on Pornography 11 (Miami Hearing).

[447] See, Rabun, Combatting Child Pornography and Prostitution: One County's Approach, in Child Sex Rings, supra note 441, at 187-200 (fifteen percent of runaway acknowledged involvement in pornography. James Scanlon & Price, Youth Prostitution, in Child Sex Rings at 139 (seventy-five percent of male hustlers aged fourteen to twenty-five had participated in pornography).

No profession is more open to the charge of ignorance in this area than the law itself.[451] Court procedures are particularly intimidating for children asked to relate extremely intimate sexual details that they know will be reacted to with horror by family and friends.[452] A criminal proceeding, moreover, creates a double bind for the child: if he is believed, a former "friend" will go to jail; if he is not, he must endure additional guilt from thoughts that perhaps he did not tell enough.[453] The study of novel investigative and courtroom procedures to address these problems is only in its infancy: where the child pornography itself is not sufficient, without use of the victim as a witness, to establish the prosecutor's case, parents are likely to face an excruciating dilemma. Lawyers and judges, like doctors and mental health professionals, remain largely ignorant of how to respond to child pornography victims.

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[448] Miami Hearing, Vol. I, Roland Summit, p. 210A19.

[449] The leading studies seem to be those contained in *Child Sex Rings*, *supra* note 440, and U. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980) (cited by the Court in *New York v. Ferber*, 458 U.S. at 758 n. 9) [hereinafter "Child Exploitation"].

[450] Statement of Roland Summit, *supra* note 448, at 8-15.

[451] The most scathing indictment of the legal system's capacity to bring child pornography cases to justice was supplied to the Commission by Dr. Roland Summit, who said, in part: "Sex crimes, more that 'legitimate' crimes, seem to require criminal conviction to justify public validation. That standard in itself represents another Catch 22 in favor of traditional denial. The insistence of proof beyond reasonable doubt for an invisible and illogical crime almost guarantees suppression and repudiation." *Id*. at 5-6.

[452] *See generally*, Summit & Kryso, *Sexual Abuse of Children: A Clinical Perspective*, in *Children and Sex* 111, 123-124 (L. Constantine & F. Martinson eds. 1981).

That ignorance is deeply unfortunate because the pain suffered by children used in pornography is often devastating, and always significant. In the short term the effects of such involvement include depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety.[454] Victims in the longer term may successfully "integrate" the event, particularly with psychiatric help,[455] but many will likely suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion, a fragmented sense of the self, and possible entry into delinquency or prostitution.[456] All, of course, will suffer the agony of knowing the record of their sexual abuse is in circulation, its effects on their future lives unknowable and beyond their control.[457] That may well be their most unhealable wound.

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[453] Child Exploitation, supra note 449, at 297.

[454] Schoettle Statement, supra note 446, at 10.

[455] Burgess, et al., Impact of Child Pornography and Sex Rings on Child Victims and Their Families in Child Sex Rings, supra note 440, at 115-117.

[456] Schoettle Statement, supra note 446, at 10.

Because the trauma inflicted on children by sexual exploitation is so great, it has seemed to the Commission particularly important to examine every possible approach to improving the state of the law and services to victims. While limitations of time and resources placed significant constraints on that effort, it was nonetheless possible to discuss the problem of child pornography from a number of different perspectives, and to develop recommendations where the evidence called for them. The recommendations so conceived follow, along with explanations of the reasons for each.

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[457] See New York v. Ferber, supra note 392, 458 U.S. at 759, and studies cited therein.

## TABLE 1

### SITUATIONAL CHILD MOLESTER

| | REGRESSED | MORALLY INDISCRIMINATE | SEXUALLY INDISCRIMINATE | INADEQUATE |
|---|---|---|---|---|
| BASIC CHARACTERISTIC | POOR COPING SKILLS | USER OF PEOPLE | SEXUAL EXPERIMENTATION | SOCIAL MISFIT |
| MOTIVATION | SUBSTITUTION | WHY NOT? | BOREDOM | INSECURITY & CURIOSITY |
| VICTIM CRITERIA | AVAILABILITY | VULNERABILITY AND OPPORUNITY | NEW AND DIFFERENT | NON-THREATENING |
| METHOD OF OPERATION | COERCION | LURE, FORCE, OR MANIPULATION | INVOLVE IN EXISTING ACTIVITY | EXPLOITS SIZE ADVANTAGE |
| PORNOGRAPHY COLLECTION | POSSIBLE | SADOMASOCHISTIC; DETECTIVE MAGAZINES | HIGHLY LIKELY; VARIED NATURE | LIKELY |

SOURCE: U.S. Department of Justice, Federal Bureau of Investigation, CHILD MOLESTERS: A Behavioral Analysis for Law Enforcement, 19, (1986).

# TABLE 2

## PREFERENTIAL CHILD MOLESTER

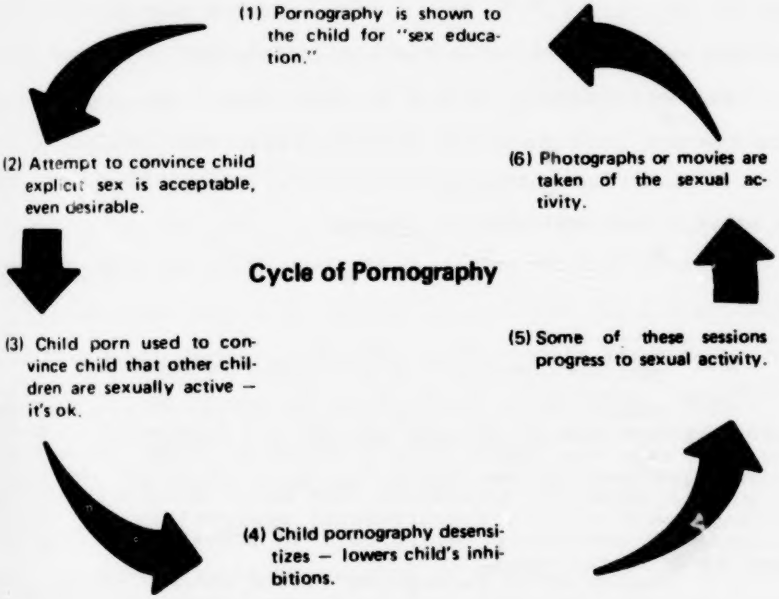
| | SEDUCTION | INTROVERTED | SADISTIC |
|---|---|---|---|
| COMMON CHARACTERISTICS | 1. SEXUAL PREFERENCE FOR CHILDREN<br>2. COLLECT CHILD PORNOGRAPHY AND/OR EROTICA | | |
| MOTIVATION | IDENTIFICATION | FEAR OF COMMUNICATION | NEED TO INFLICT PAIN |
| VICTIM CRITERIA | AGE AND GENDER PREFERENCES | STRANGERS OR VERY YOUNG | AGE AND GENDER PREFERENCES |
| METHOD OF OPERATION | SEDUCTION PROCESS | NON-VERBAL SEXUAL CONTACT | LURE OR FORCE |

SOURCE: U.S. Department of Justice, Federal Bureau of Investigation, CHILD MOLESTERS: A Behavioral Analysis for Law Enforcement, 25, (1986).

# TABLE 3

## CYCLE

One of the most common questions asked from a public that knows very little about child pornography is: "How does child pornography begin?" This diagram explains one of the most common ways a child is introduced to pornographic activity:



**Cycle of Pornography**

(1) Pornography is shown to the child for "sex education."

(2) Attempt to convince child explicit sex is acceptable, even desirable.

(3) Child porn used to convince child that other children are sexually active — it's ok.

(4) Child pornography desensitizes — lowers child's inhibitions.

(5) Some of these sessions progress to sexual activity.

(6) Photographs or movies are taken of the sexual activity.

SOURCE: S. O'Brien, Child Pornography, 89, (1983).

RECOMMENDATION 37:

CONGRESS SHOULD ENACT A STATUTE REQUIRING THE PRODUCERS, RETAILERS OR DISTRIBUTORS OF SEXUALLY EXPLICIT VISUAL DEPICTIONS TO MAINTAIN RECORDS CONTAINING CONSENT FORMS AND PROOF OF PERFORMERS' AGES.

Pornographers use minors as performers in films and other visual depictions.[458] The consumer demand for youthful performers has also created a class of pornography referred to as pseudo child pornography.[459] The growth of pseudo child pornography has made it increasingly difficult for law enforcement officers to ascertain whether an individual in a film or other visual depiction is a minor.

Minors deserve special protection from the risks inherent in the production of pornographic materials.[460] The performers may be subjected to threats and coercion, provided with controlled substances or exposed to a variety of sexually transmitted diseases.[461] The Child Protection Act of 1984[462] is designed to prohibit employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.[463]

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[458] *See*, The discussion of performers in Part Four.

[459] Pseudo child pornography or "teasers" involve women allegedly over the age of eighteen who are "presented in such a way as to make them appear to be children or youths. Models used in such publications are chosen for their youthful appearence (e.g., in females, slim build and small breasts); and are presented with various accoutrements designed to enhance the illusion of immaturity (e.g., hair in ponytails or ringlets, toys, teddy bears, etc.).

'Pseudo child pornography' is of concern since it may appeal to the same tastes and may evoke responses similar or identical to those elicited by true child pornography. However, it is distinct from, and is not 'genuine' child pornography in the sense that it is older adolescents or adults who are displayed in these sexually explicit depictions. It is not individual children who have been directly exploited in the making of such materials. Committee on Sexual Offences Against Children and Youth, 2 *Sexual Offences Against Children*, 1192 (1984). [hereinafter cited as *Sexual Offences Against Children*].

This proposed legislation should afford protection to minors through every level of the pornography industry. The recordkeeping obligation should be imposed on wholesalers, retailers, distributors, producers and any one engaged in the sale or trade of sexually explicit material as described by the Child Protection Act.

The concern to be addressed through this legislation is the safety and well-being of children. The current law contains gaps which allows the exploitation of minors to continue. Legislation should be drafted to close the gaps and afford children full protection in every phase of the production and distribution of sexually explicit materials.

Producers would be required to obtain proof of the age of the performer and record the same on a signed release form if the performer engages in any sexual act which would be in violation of The Child Protection Act.[464]

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[460] See, New York v. Ferber, 458 U.S. 758 (1982).

[461] See, The discussion of performers, infra.

[462] 18 U.S.C. SS 2251-2252 (1985).

[463] Id.

Despite the umbrella protection provided by the Child Protection Act of 1984, loopholes remain that permit the continued exploitation of children. For example, experts and law enforcement officers have found it difficult to extend this protection because in many instances, ascertaining the real ages of adolescent performers is impossible. By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one? The growth of the category of pseudo child pornography has further confused the issue.

The above legislation will assist officials in assuring the safety and well being of children.

The recomended legislation would require producers to obtain release forms from each performer with proof of age.[465] The forms would be filed at a specified location listed in the opening or closing footage of a film, the inside cover of the magazine or standard locations in or on other material containing visual depictions.[466]

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[464] Producers may fullfill the proof of age requirement through obtaining a driver's license, birth certificate or other verifiable and acceptable form of age documentation.

[465] The release forms should also include the stage names of the performers as well as any other aliases the performer may use, fingerprints to avoid forgery or fraudulent certification and the last known address and telephone number for the purpose of verification.

[466] "I think consent is a very important part of freedom . . . we all want to increase volunteerism and decrease lack of consent whether that be by models or purchasers of

The name, offical title and location of the responsible person or corporate agent supervising such records would also be listed to avoid use of corporate shields. The release forms should be available for inspection by any duly authorized law enforcement officer upon demand as a regulatory function for the limited purposes of determining consent and proof of age.[467] The information contained in these records should not be used as evidence of obscenity or related offenses in a grand jury proceeding or by a petit jury or trier of fact, but should only be used for prosecution of this offense. This exception from use in evidence is necessary to secure compliance by the largest number of persons and avoid Fifth Amendment problems.

A producer should be required to maintain these records for a minimum period of five years.468 Failure to comply with any of these requirements would be punishable as a felony. This legislation would not only protect minors from abuse, but it would also place the burden of ensuring this protection was implemented squarely on the producers of the materials. The proposed legislation would serve a record keeping purpose

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magazines." New York Hearing, Vol. II, Alan Dershowitz, p. 312.

[467] This inspection requirement would be similar to the inspection provision included in section 3007 of the Resource Conservation Recovery Act of 1976, as amended in that search warrant would not be necessary for routine examination of records.

[468] The five year requirement would commence the date the film was released or the magazine was distributed.

comparable to that found in environmental and similar statutes.[469] Performers in pornography face more risks than just sexual abuse. A dscision by young performer to appear in pornographic materials has serious implications for his or her future personal life and career prospects. The existence of the material and its intermittent resurfacing may destroy employment prospects and threaten family stability.470

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[469] Examples of similar recordkeeping legislation and the penalties are: The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) which provides, "The Administrator may prescribe regulations requiring producers to maintain such records with respect to their operations and the pesticides and devices produced as he determines are necessary for the effective enforcement of this Act." 7 U.S.C. S1361 (3) FIFRA also gives the administrator of the Environmental Protection Agency the authority to inspect the premises to ensure compliance. "(b) Inspection. - For the purposes of enforcing the provision of this Act, any producer, distributor, carrier, dealer, or any other person who sells or offers for sale, delivers or offers for delivery any pesticide or device subject to this Act, shall, upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, duly designated bghy the Administrator, furnish or permit such person at all reasonable times to have access to, and to copy: (1) all records showing the delivery, movement, or holding of such pesticide or device, including the quantity, the date of shipment and receipt, and the name of the consignor and consignee; or (2) in the event of the inability of any person to produce records containing such information, all other records and information relaing to such delivery, movement, or holding of the pesticide or device." 7 U.S.C. S 1361; Failure to comply with the provision may result in civil or criminal penalties. "Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who knowingly violates any provision of this Act shall be guilty of a misdemeanor and shall on conviction be fined not more than $25,000, or imprisoned for not more than one year, or both." 7 U.S.C. S136n. The Resource Conservation and Recovery Act of 1976 requires hazardous waste generators, transporters and owners and operators of treatment, storage and disposal facilities to maintain adequate business records. See, 42 U.S.C. SS3002, 3003, 3004. If the records are not maintained, the owner, operator, generator or transporter of hazardous waste may be subject to civil and criminal penalties. "Any person who- " (3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator under this subtitle: shall, upon conviction, be subject ot a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph shall be doubled with respect to both fine and imprisonment." 42

RECOMMENDATION 38

CONGRESS SHOULD ENACT LEGISLATION PROHIBITING PRODUCERS OF CERTAIN SEXUALLY EXPLICIT VISUAL DEPICTIONS FROM USING PERFORMERS UNDER THE AGE OF TWENTY-ONE.

Producers are currently proscribed through the Child Protection Act from using performers under the age of eighteen to engage in various sexually explicit materials. The proscribed acts include actual or simulated:

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
(B) bestiality;
(C) masturbation;
(D) sadistic or masochistic abuse; or
(E) lascivious exhibition of the genitals or pubic area of any person.471

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U.S.C. S3008.

[470] Los Angeles Hearing, Vol. II, Miki Garcia, p. 118-20; Washington, D.C., Hearing, Vol. II, Tom, p. 50.

[471] 18 U.S.C. S2255 (1985).

The Act should be amended to protect performers under the age of twenty-one. The amendment should prohibit producers from using persons between the ages of eighteen and twenty-one in visual depictions of certain sexually explicit activities. The proscribed activities should includes actual:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Sadistic or masochistic abuse; or

(E) Lascivious exhibition of the gentials or pubic area of any person.

Persons between the ages of eighteen and twenty-one while physically mature still face problems associated with sexually explicit performances. These risks include: pregnancy,[472] sexually transmitted diseases,[473] physical abuse[474] and damage to self esteem and mental health.[475]

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[472] Enablers, Inc., Juvenile Prostitution in Minnesota 86 (1978) (over one-half of juvenile female prostitutes had been pregnant at least once; thirty percent had been pregnant two or more times).

[473] See, e.g., Enablers, Inc., supra note 472, at 85. (half of the female prostitutes interviewed indicated they had venereal disease); D.K. Weisberg, Children in the Night 167 (1985) [hereinafter cited as Children in the Night] (venereal disease "plagues" juvenile prostitutes; and is their "most prevelant health concern"); 2 Sexual Offences Against Children, 1024 (1984) (majority of juvenile prostitutes studied in Canada had contracted a sexually transmitted disease, and almost a third do not seek regular medical attention).

Perhaps because of the inner conflicts common among this age group, adolescents are notoriously poor in making sexual choices well into their late teens and twenties. Thus adolescent use of contraceptives "approaches an almost random pattern,"[476] with only a third of sexually active teenagers using contraception consistently.[477] Likewise women aged sixteen to nineteen were eighty-eight percent more likely than women age twenty-five to twenty-nine to seek an abortion after twelve weeks of gestation - with women aged twenty to twenty-four fully twenty-five percent more likely to wait than the older group.[478]

Partially because of poor maturity, and partially because of economic and social factors, the health risks of teenage sex are significant. Both infant and maternal mortality are higher for

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[474] Silbert & A. Pines, *Occupational Hazards of Street Prostitutes*, 8 Crim. Just. & Behavior 395 (1981) (sixty-five percent of sample of prostitutes had been victims of violence, an average of 9.2 times each; seventy-five percent victimized by "forced perversion"); *Children in the Night*, *supra* note 473, at 162 (violence also an occupational problem for juvenile male prostitutes).

[475] Washington, D.C., Hearing, Vol. I, David, p. 47; Washington, D.C., Hearing, Vol. I, Jeff, p. 167; Washington, D.C., Hearing, Vol. I, Lisa, p. 61.

[476] F. Bolton, *The Pregnant Adolescent: Problems of Premature Parenthood* 35 (1980).

[477] Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 11 (1981). [hereinafter cited Alan Guttmacher Inst., *Teenage Pregnancy*] The vast majority of sexually active adolescents, of course, are aged eighteen, nineteen, and twenty. *Id.* at 7.

[478] Centers for Disease Control, *Abortion Surveillance* 37 (1985). [hereinafter cited as CDC, *Abortion Surveillance*]

women aged fifteen to nineteen.479 More precisely, the rate of low birth weight among babies born to nineteen year-old white mothers is twenty-five percent higher than that for babies born to white mothers aged twenty to twenty-four.[480] Abortions, too, are riskier for white women in late adolescence than for older women because they tend to seek them at a much more advanced gestational stage.[481]

Teenagers participating in pornography face all the risks attendant upon adolescent sexual activity but face as well one certainty that other teenagers do not. Their sexual activity, played out before a camera and live audience, is "a graphic form of exhibitionism . . . [which] literally makes the child's body 'available' for anyone willing to pay the price anywhere in the world."482 Without reciting all the adverse consequences which young "models" suffer, it is sufficient to note that they can be severe 483 and, even more importantly, irreversible. Unlike the young prostitute who may be able to leave his or her past behind,

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[479] Id. at 10, 37.

[480] Alan Guttmacher Inst., Teenage Pregnancy, supra note 477, at 29.

[481] CDC, Abortion Surveillance, supra note 478, at 37.

[482] Schoettle, Child Exploitation: A Study of Child Pornography, J. Am. Acad. Child Psych. 289, 296 (1980).

[483] See, e.g., Wood v. Hustler Magazine, Inc., 736 F. 2d 1084, 1086 (5th Cir. 1984) (description of anguish and harassment suffered by woman whose nude photo was stolen and published in Hustler); Lederer, Then and Now - An Interview with a Former Pornography Model in Take Back the Night: Women on Pornography 57 (1980); Testimony of George (Los Angeles).

the adolescent "porn star" must always live in fear that the film or photograph will surface, once again wreaking havoc in his or her personal and professional life.

Because of the economic and social realities of late adolescence, moreover, it is highly unlikely that a decision to accept these consequences has been made in an atmosphere free of pressure or coercion. Youths aged eighteen to twenty-one as a group suffer extraordinary levels of unemployment and homelessness.[484] The rate of poverty among the sixteen to twenty-one age group is almost half again as high as that among older adults.[485] It is hardly surprising that desperate youths are attracted by the quick money to be made in pornography. In describing why as a young man he made a "skin flick", Sylvester Stallone said that he was literally starving, and "It was either do that movie or rob someone."[486] Yet it is equally clear that it offers them no future as a career in itself, and may in fact further worsen their prospects for stable, long-term employment.[487]

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[484] Youths aged sixteen to nineteen are 160 percent more likely to be unemployed than older workers. Those aged twenty to twenty-four are still ninety-three percent more likely to be unemployed than older workers. Stastical Abstract at 394. At Covenant House 's New York program alone last year over 5,500 youths aged eighteen to twenty-one -- virtually all of them homeless -- sought crisis shelter. Only a small minority could be placed in independent living arrangements, job training or institutional shelters.

[485] Statistical Abstract at 456.

[486] Playgirl 39 (Oct. 1985).

[487] See, C. Hix, Male Model 1985-86 (1979). (In answer to the question "Would you advise anyone to do nude modelling as a steppingstone into a legitimate career?" porn star Jack Wagner

Much participation in pornography, of course, occurs as part of the "career" of juvenile prostitution,[488] and it is worth noting that a significant percentage of youths involved in prostitution have been coerced into "the life."[489]

Many of the difficulties discussed could be eliminated through a prohibition on the use of persons under the age of eighteen in any sexually explicit depiction as desented in the Child Protection Act. Persons between the ages of eighteen and twenty-one would receive the necessary protection through a prohibition against participation in certain scenes of actual sexual activity.

RECOMMENDATION 39:

CONGRESS SHOULD ENACT LEGISLATION TO PROHIBIT THE EXCHANGE OF INFORMATION CONCERNING CHILD PORNOGRAPHY OR CHILDREN TO BE USED IN CHILD PORNOGRAPHY THROUGH COMPUTER NETWORKS.

Many pedophile offenders and child pornographers have

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said, "Absolutely not. There are a lot of companies, film companies as well, that won't hire you if you have done nude modelling whether it was for Playgirl or Playboy or whatever." Id. at 186.)

[488] Sexual Offences Against Children, supra note 473, at 1198-99 (1984); Children of the Night supra note 473, at 68-69 (1985) (fourteen of fifty-four juvenile prostitutes for whom information was available had been photographed for commercial photography).

[489] Huckleberry Study at 34; Sexual Offences Against Children, supra note 473, at 992-93. These studies indicate that about one in six female prostitutes under age twenty-one had been physically coerced into their roles.

traditionally used the mails as a mainstay of their psychological base as well as the source of information regarding potential victims.[490] Recently however, pedophile offenders and child pornographers have begun to use personal computers for communications.[491] A person may now subscribe to an information service whereby he or she can contact other subscribers.[492] The services are private commercial enterprises which sell access codes to subscribing members. These services offer everything from "private" communications accessed through individual code words to conference calls.[493] The communication may also take the form of a "bulletin board" message to which any other subscriber may respond.[494]

Personal computers have instant communication capabilities and have afforded subscribers the opportunity to establish extensive networks.[495] Within these networks one or two pedophile offenders or child pornographers will often assume leadership roles.[496] These individuals will coordinate the conversations and activities with other members of the networks.[497]

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[490] Miami Hearing, Vol. I, Paul Hartman, p. 105.

[491] Id. at 106.

[492] Id. at 106-07.

[493] Id. at 108-10.

[494] During his testimony before the Commission, Postal Inspector Paul Hartman stated, "...I accessed a computerized bulletin board and found a message rather casually displayed proclaiming another subscriber's interest in photographs of teen and preteen children." Id. at 108.

[495] Id. at 109.

[496] Id. at 111.

Subscribers may identify themselves using a first name and will identify the children with whom they are currently sexually involved.[498] The vast network which may develop enables pedophile offenders who live hundreds of miles apart to communicate about contact with a child known to both.[499] During these computerized conversations the offender may describe his actual and imagined sexual exploits with children.

Investigators have discovered that pedophile offenders use personal computer communications to establish contacts and as sources for the exchange or sale of child pornography.[500] The computer user, after establishing a secure relationship with another subscriber, will arrange for materials to be sent through the mail.[501] The subscribers will identify and describe the types of materials they seek. Respondents will then transmit the materials to the designated address.

Pedophile offenders and child pornographers may also use personal computer services to identify particular children who can be used in making child pornography.[502] The subscribers may describe the child physically and give a location where the child may be found.[503]

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[497] Id.

[498] Id.

[499] Id. at 111-12.

[500] Id. at 111.

[501] Id. at 108-09.

[502] Id. at 111.

The technologically complex computer systems and networks operated by pedophile offenders and their multijurisdictional nature should prompt federal interest and substantiate jurisdiction.[504] Each of these systems uses an interstate common

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[503] Id.

[504] Hearings before the Senate Judiciary Committee, Subcommittee on Juvenile Justice, Oct. 1, 1985, p. 4; Senator Paul S. Trible, Jr. (R-Va.), and Senator Jeremiah Denton (R-Ala.) have introduced Senate Bill 1305 to amend 18 U.S.C. sections 1462 and 2252 to prohibit the use of computers for the interstate or foreign dissemination of obscene material, child pornography and advertisements for the same and information about minors which can be used for facilitating, encouraging, offering or soliciting sexually explicit conduct with a minor. The legislation provides:

BILL

> "To amend title 18, United States Code, to establish criminal penalties for the transmission by computer of obscene matter, or by computer or other means, of matter pertaining to the sexual exploitation of children, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Computer Pornography and Child Exploitation Prevention Act of 1985".
>
> Sec. 2 Section 1462 of Title 18, United States Code is amended by -
>
> (1) Inserting after subsection (c) the following:
>
> "(d) any obscene, lewd, lascivious, or filthy writing, description, picture, or other matter entered, stored, or transmitted by or in a computer; or "Whoever knowingly owns, offers, provides, or operates any computer program or service is being used to transmit in interstate or foreign commerce any matter the carriage of which is herein made unlawful; or" and
>
> (2) inserting at the end thereof the following:

"For purposes of this section --

(1) the term 'computer' means an electronic magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device;

"(2) the term 'computer program' means an instruction or statement or a series of instructions or statements in a form acceptable to a computer which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system:

"(3) the term 'computer service' includes computer time, data processing, and storage function; and

"(4) the term 'computer system' means a set of related connected, or unconnected computers, computer equipment, devices, and software."

"(c) Any person who knowingly enters into or transmits by means of computer, or makes, prints, publishes, or reproduces by other means, or knowingly causes or allows to be entered into or transmitted by means of compute, or made, printed, published, or reproduced by other means --

"(1) any notice, statement or advertisement, or

(2) any minor's name telephone number, place of residence, physical characteristics, or other descriptive or identifying information.

For purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any minor, or the visual depiction of such conduct, shall by punished as provided in subsection (d) of this section, if such persons knows or has reason to know that such notice, statement, advertisement, or descriptive or identifying information will be transported in interstate or foreign commerce or mailed, or if such information has actually been transported in interstate or foreign commerce or mailed."

Sec. 4, Section 2252 of Title 18, United States Code, is amended --

carrier, the telephone, as its communication medium. The information about these minors is routinely conveyed between or among various states.

A recent example occurred in Raleigh, North Carolina, where

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> (1) in subsection (a) by striking out "subsection (b)" and inserting in lieu thereof "subsection (c)"
>
> (2) by redesignating subsection (b) as subsection (c);
>
> (3) by inserting after subsection (a) the following new subsection:
>
>> "(b) Any person who knowingly enters into or transmits by means of computer, or makes, prints, publishes, or reproduces by other means, or knowingly causes or allows to be entered into or transmitted by means of computer, or made, printed, published, or reproduced by other means any notice, statement, or advertisement to buy, sell, receive, exchange, or disseminate any visual depiction, if --
>>
>> "(1) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>> (2) such visual depiction is of such conduct;
>>
>> shall be punished as provided under subsection (c), of this section, if such person knows or has reason to know that such notice, statement, or advertisement will be transported in interstate or foreign commerce or mailed, or if such notice, statement, or advertisement has actually been transported in interstate or foreign commerce or mailed."
>
> Sec. 5, Section 2255 of Title 18, United States Code is amended by adding at the end thereof the following new paragraph:
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>> "(5) 'computer' means an electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage function, and includes any data storage facility directly related to or operating in conjunction with such device."

authorities discovered a computer network known as the "Gay Teen Conference" which was operated by a local man. The network could be reached by any computer operator who obtained a special password and it contained descriptions and depictions of various homosexual acts. The operator of "Gay Teen Conference" also operated a religious computer bulletin board known as "Ministry Bulletin Board." A computer operator was able to obtain the password for "Gay Teen Conference" by contacting the "Ministry Bulletin Board."[505] The proposed legislation would provide a useful law enforcement tool in this area of serious concern.

RECOMMENDATION 40:

CONGRESS SHOULD AMEND THE CHILD PROTECTION ACT FORFEITURE SECTION TO INCLUDE A PROVISION WHICH AUTHORIZES THE POSTAL INSPECTION SERVICE TO CONDUCT FORFEITURE ACTIONS.

The United States Postal Inspection Service is the investigative arm of the United States Postal Service.[506] It has investigative responsibilities over all criminal violations of federal law relating to the Postal Service including the child pornography laws.[507]

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[505] Seminary Graduate Charged in Porno Computer Network, The Fayetteville (N.C.) Times, Feb. 7, 1986, p. 14B.

[506] Washington, D.C., Hearing, Vol. I, Charles Clauson, p. 135.

[507] Postal Crimes fall within two broad categories: Criminal Acts (1) against the postal service or its employees, such as armed robberies, burglaries or theft of mail, and (2) misuse of the postal system such as the mailing of bombs, use of

The most common method of circulating child pornography has traditionally been through the mail.[508] The mail provides a clandestine and anonymous form of communication for both parties.[509]

The efforts of the Postal Inspection Service in the investigation of child pornography would be greatly enhanced through an amendment to the Child Protection Act permitting the Postal Inspection Service to engage in forfeitures.[510]

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the mails to distribute pornography. Id.

[508] Washington, D.C., Hearing, Vol. I, Daniel Mihalko, p. 145-46.

[509] Id. at 146.

[510] The amendment should be as follows:

> To amend the Child Protection Act of 1984 to authorize the Postal Service to conduct civil administrative seizures and forfeitures under the Act, and for other purposes.
>
> Sec. 1. Subsection (b) of section 2254 of title 18 United States Code, is amended by inserting "or the Postal Service" after "the Attorney General."
>
> Sec. 2. Section 2003(b) of title 39, United States Code, is amended --
>
> (1) in paragraph (b) (5) by striking out "and";
>
> (2) in paragraph (b) (6) by striking out the period at the end and inserting in lieu thereof a semicolon and "and";
>
> (3) by inserting at the end of subsection (b) the following new paragraph: "(7) amounts from any civil administrative forfeiture conducted by the Postal Service"; and
>
> (4) by inserting in the first sentence of paragraph (e) (1), immediately following the word "title" the first time it appears, the following: "including expenses incurred in the conduct of seizures, forfeitures and

Since 1984 there has been an increased enforcement effor against child pornography. From January 1, 1978, to May 21 1984, only sixty-nine defendants were indicted for chil pornography violations.[511] From May 21, 1984, to June 1985, there were 103 defendants indicted for child pornography violations.[512]

In 1984 the Postal Inspection Service spent 50,000 hours and completed 168 pornography investigations which resulted in sixty-nine arrests.[513] During the first eight months of 1985 the Service spent 36,000 hours and completed ninety-nine investigations.[514] These efforts resulted in 114 arrests.[515] In June 1985 there were over two hundred open Postal Service investigations of potential child pornography violations.[516]

Under current federal law the Postal Inspection Service is excluded from participation in forfeiture actions. The forfeiture provision would enable inspectors the opportunity to recover items of value which were used in or derived from illegal activities. This provision should be structured to assist in

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disposal of forfeited property pursuant to title 18.

[511] Chicago Hearing, Vol. II, James S. Reynolds, p. 268.

[512] Id.

[513] Washington, D.C., Hearing, Vol.I, Jack Swagerty, p. 140.

[514] Id.

[515] Id.

[516] Id.

making the Postal Inspection Service investigations self-supporting and assist in defraying the cost of subsequent prosecutions as well as removing resources from the hands of offenders.

RECOMMENDATION 41:

CONGRESS SHOULD AMEND 18 U.S.C. S2255 TO DEFINE THE TERM "VISUAL DEPICTION" AND INCLUDE UNDEVELOPED FILM IN THAT DEFINITION.

The Child Protection Act prohibits the transportation of certain sexually explicit visual depictions. The predecessor to the present Act specifically defined visual depictions. The language of the current Act has been used successfully by defense attorneys to exclude undeveloped film that has been legally seized.[517] In an effort to curb the continued exploitation of children, it is necessary to define the term "visual depictions" to include images contained on rolls of undeveloped film, video tape and sketches, drawings or paintings of actual persons.[518] This amendment will afford United States Attorneys the opportunity to bring an indictment under the Child Protection Act for offenses depicted on film undeveloped while under the control of an offender.

The current statute creates a dilemma for law enforcement agents and prosecutors in the case of undeveloped film. If the

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[517] See, Letter from Joyce A. Karlin to Henry E. Hudson (Dec. 20, 1985).

[518] Id.

pages tightly bound

indictment is brought while film if yet to be developed the depictions contained on the undeveloped film are not subject to prosecution. If the film is allowed to remain in the hands of the offender until developed it is virtually impossible to prevent the pictures from entering circulation which is the very harm sought to be eliminated. This amendment would end the dilemma and enable the prosecution of child pornography contained on undeveloped film possessed by the offender.

RECOMMENDATION 42:

CONGRESS SHOULD ENACT LEGISLATION PROVIDING FINANCIAL INCENTIVES FOR THE STATES TO INITIATE TASK FORCES ON CHILD PORNOGRAPHY AND RELATED CASES.

The responsibility for financial assistance for a task force program does not lie solely with the federal government, but the program should be the product of a coordinated financial effort between federal and state governments.[519] Federal programs and funding should reward state governments which assume their proper role in creating the task forces described below.

The task forces would consist of experts from different fields including the judiciary, law enforcement agents, and health professionals who would be charged with recommending and implementing changes in the court system and methods to more effectively handle cases of child abuse and exploitation which result from the production and use of child pornography. Upon implementation of such task forces, federal funds would be provided to a state. Federal assistance of this nature would enable states to the task force approach more effectively and economically.

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[519] This Commission does not encourage or promote the concept of federal funding of programs which are properly withing the responsibility of state and local governments. The importance of this program, however, calls for a coordinated effort and an initial incentive plan.

Enabling legislation should provide grants to state governments to establish, develop, implement or operate programs directed toward the treatment and prevention of child sexual abuse related to child pornography.[520] The programs should

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[520] Senator Paula Hawkins (R-Fla.) has introduced the Children's Justice Act which attempts to facilitate investigations and prevention of child sexual abuse. The bill provides:

SHORT TITLE

SECTION 1. This Act may be cited as the "Children's Justice Act".

CHILDREN'S JUSTICE GRANT

SEC. 2, Section 4 of the Child Abuse Prevention and Treatment Act is amended by -

(1) redesignating subsection (d), (e), (f), the first time such subsection appears, and (f), the second time such subsection appears, as subsection (e), (f), (g), and (h), respectively; and

(2) inserting after subsection (c) the following:

"(d) (1) In addition to grants made to States under subsection (b), the Secretary is authorized to make grants to States for the purpose of assisting States in the developing, establishing, operating, or implementing programs or procedures for -

"(A) handling child abuse cases, especially child sexual abuse cases, in a manner which reduces the trauma to child victims;

"(B) improving the chances of successful prosecution or legal action against individuals who abuse children, especially individuals who sexually abuse children; or

"(C) improving procedures for protecting children from abuse,

in accordance with the eligibility requirements of this subsection. Grants under this subsection may be made to the State agency which administers funds received under subsection (a) or to an appropriate statewide law enforcement agency which has developed a child abuse program which meets the requirements of paragraph (2). The determination as to which agency of a State may apply for a grant pursuant to the preceding sentence shall be made by the chief executive officer of such State.

"(2) (A) In order for a State to qualify for assistance under this subsection, such State shall, except as provided in subparagraphs (B) and (C) -

"(i) establish a multidisciplinary task force as provided in paragraph (3); and

"(ii) adopt reforms recommended by the multidisciplinary task force in each of the three categories provided in subparagraphs (B), (C), and (D of paragraph (3).

For purposes of clause (ii), reforms may include proof that the State has made substantial improvement in implementing or enforcing State laws or administrative practices in effect on the date of enactment of the Children's Justice Act as recommended by the task force of such State under paragraph (3).

"(B) If the Secretary determines, at the request of any State on the basis of information submitted by the State that such State -

"(i) has established a multidisciplinary task force within the 3 years prior to the enactment of the Children's Justice Act with substantially the same functions as the multidisciplinary task force provided for under this subsection; and "(ii) is making satisfactory progress toward developing, establishing, operating, or implementing the programs or procedures in each of the three categories provided in subparagraphs (B), (C), and (D) of paragraph (#) and will continue to do so,

then such State shall not be required to meet the requirements of Subparagraph (A).

"(C) A State may adopt reformed recommended by the task force of such State in less than all three of the categories provided in subparagraphs (B), (C), and (D) of paragraph (3), but in the event that a State fails to adopt any recommendation in a category the State shall submit to the Secretary a detailed explanation of the reasons for the State not planning to carry out any such omitted recommendation.

"(3) (A) Each State desiring to receive a grant under this subsection shall establish a multidisciplinary task force on children's justice composed of professionals experienced in the criminal justice system and its operation relating to issues of child abuse. The task force shall include representatives of the law enforcement community, judicial and legal officers including representatives of the prosecution and the defense, child protective services, child advocates, health and mental health professionals, and parents. Each State task force shall, for fiscal year 1987, review, analyze, and make recommendations for reforms needed to improve the response of such State to child abuse cases in each of the categories described in subparagraphs (B), (C), and (D).

"(B) A State shall provide for the handling of child abuse cases, especially child sexual abuse cases, in a manner which reduces the trauma to the child victim. Administrative procedures consistent with the reduction of trauma may include -

"(i) the establishment of interdisciplinary teams of child abuse professionals such as law enforcement officers, child protective service workers, prosecutors, child's advocates, mental health professionals, and medical personnel for handling child abuse cases;

"(ii) coordinated court proceedings for handling intrafamily child abuse; or "(iii) providing for specialized training of la enforcement, legal, judicial, and child welfar personnel to deal with child abuse victims and thei families.

"(C) A State shall establish reforms designed t improve the chances of successful prosecution or lega action against individuals who abuse children, especiall individuals who sexually abuse children. Such reforms ma include -

"(i) strengthening the State definition of child sexual abuse;

"(ii) modifications of certain evidentiary restrictions such as the corroboration requirement and the qualification of child abuse victims as witnesses to allow for the age of child abuse victims; or

"(iii) establishing procedures for the closed-circuit televising or videotaping of victim's testimony under circumstances which ensure procedural fairness while minimizing the trauma to the child abuse victim, especially child sexual abuse victim.

"(D) In order to improve procedures to protect children from abuse, especially sexual abuse, a State shall establish administrative reforms by law or, if possible, pursuant to law by administrative action, such as -

"(i) providing a guardian ad litem who is assigned to make an independent investigation and report to the court on recommendations regarding what action should be taken that would be in the best interests of the child;

"(ii) granting courts authority to grant civil protection orders to protect children from further abuse, or

"(iii) providing treatment programs for the individual who abuses children, especially the individual who sexually abuses children, and the abused child.

"(4) A grant authorized by this subsection may be made by the Secretary upon application which is made at such time or times and contains or is accompanied by such information as the Secretary may prescribe. Each such application shall-

"(A) contain such assurances as may be necessary to evidence compliance with paragraphs (2) and (3);

"(B) contain assurances that the State will comply with the requirements of paragraph (2)(A)(ii) during the fiscal year for which the grant is made; and

"(C) provide for making such reports, in such form and containing such information as the Secretary may require to carry out his functions under this subsection, and for keeping such records and for affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports.

"(5) (A) In order to assist the States in developing effective approaches to achieve the objectives set forth in paragraph (1), the Secretary, through the National Center on Child Abuse and Neglect established pursuant to section 2(a), shall -

"(i) compile, analyze, publish, and disseminate to each State a summary, including an evaluation of the effectiveness or lack thereof, of approaches being utilized, developed, or proposed with respect to improving the investigation and prosecution of child sexual abuse cases in a manner which reduces the trauma to the child victim along with such other materials or information as may be helpful to the States in developing or implementing programs or procedures to satisfy the requirements of this subsection;

"(ii) develop and disseminate to appropriate State and officials model training materials and procedures to help ensure that all law enforcement, legal, judicial, and child welfare personnel are adequately trained to deal with child sexual abuse victims; and

"(iii) provide for the support of research projects to assist in identifying effective approaches to achieving the objectives of this subsection.

"(B) Not later than two years after the date funds are obligated under section 5(b) for the first fiscal year, the Secretary shall -

"(i) review and evaluate the effectiveness of the activities carried out with such funds in achieving the objectives of this subsection; and

"(ii) report to the appropriate committees of th Congress on the results of such review and evaluati and on the steps taken by the Secretary, through th National Center on Child Abuse and Neglect Center, assist the States in achieving such objectives.

"(C) The summary, information, and materials require under subparagraph (A) shall be made available t appropriate State officials not later than 180 days afte the date of the enactment of the Children's Justice Act."

### AUTHORIZATION

SEC. 3. Section 5 of the Child Abuse Preventio Treatment Act is amended by -

(1) inserting "(a)" after "Sec. 5"; and

(2) inserting at the end thereof the following:

"(b) There are authorized to be appropriate $12,000,000 for each of the fiscal years 1987 and 198 for the purposes of making grants under subsection (d of section 4."

### COORDINATION OF FEDERAL PROGRAMS INVOLVING CHILD ABUSE

SEC. 4. Section 7 of the Child Abuse Prevention an Treatment Act is amended by -

(1) inserting "(a)" after "Sec. 7."; and

(2) inserting at the end thereof the following:

"(b) (1) Within 180 days of the date of enactment of the Children's Justice Act and every 6 months thereafter, the Attorney General, the Secretary of Health and Human Services, Secretary of Education, and the head of any other agency or department designated by the President, or their designees, responsible for programs involving child abuse prevention and treatment shall meet for the purpose of coordinating such programs in order to -

"(A) prevent the overlap of such programs and the resulting waste of resources; and

"(B) assure that such programs effectively address all aspects of eh child abuse problem.

"(2) Within one year of the date of the enactment of the Children's Justice Act and annually thereafter, the Secretary of Health and Human Services shall report to Congress with respect to the actions carried out by agencies and departments of the United States for the purpose of coordinating programs involving child abuse prevention and treatment as provided in paragraph (1)."

### MODIFICATION OF FBI OFFENSE CLASSIFICATION SYSTEM

Sec. 5. The Attorney General shall modify the classification system used by the National Crime Information Center in its Interstate Identification Index, and by the Identification Division of the Federal Bureau of Investigation in its Criminal File, and its Uniform Crime Reporting System with respect to offenses involving sexual exploitation of children by -

(1) including in the description of such offenses by the age of the victim and the relationship of the victim to the offenders; and

(2) classifying such offenses by using a uniform definition of a child.

### AMENDMENT TO PUBLIC HEALTH SERVICE ACT

Sec. 6 (a) Section 523 of the Public Health Service Act (42 U.S.C. 290dd-3) is amended -

(1) by striking out "subsection (e)" in subsection (a) and inserting in lieu thereof "subsections (e) and (i)"; and

(2) by adding at the end the following new subsection:

"(i) Nothing in this section shall be construed to supersede the application of State and local requirements for the reporting of incidents of suspected child abuse to the appropriate State or local authorities."

(b) Section 527 of such Act (42 U.S.C. 290cc-3) is amended -

(1) by striking out "subsection (e) in subsection(a)

handle child sexual abuse cases resulting from the production o child pornography in a manner which reduces the trauma for th victims and the programs should implement procedures which lea to an increase in successful prosecutions against pornographer who sexually abuse children. The program should also presen methods of protecting children from the sexual abuse associate with children pornography and related offenses. Many state undoubtedly will recognize the merit of this program and wil take the initiative in implementing these procedures.

Congressional action should also address the need for a effective information network which is essential to la enforcement and social service agencies. The information shoul be assembled for immediate access to assist law enforcement officers as they proceed with a child pornography or related case. This information network should have specific connections with the Uniform Crime Reporting System operated by the Federal Bureau of Investigation. This type of legislation would facitilate the investigation of child sexual abuse and child

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and inserting in lieu thereof "subsections (e) and (i)"; and

(2) by adding at the end the following new subsection:

> Amend the title so as to read "A bill to amend the Child Abuse Prevention and Treatment Act to establish a program to encourage States to enact child protection reforms which are designed to improve legal and administrative proceedings regarding the investigation and prosecution of the child abuse cases, especially child sexual abuse cases."

pornography cases and would lead to effective methods to curb the flow of child pornography and the continued sexual abuse of children.[521]

RECOMMENDATION 43:

CONGRESS SHOULD ENACT LEGISLATION TO MAKE THE ACTS OF CHILD SELLING OR CHILD PURCHASING, FOR THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS, A FELONY.

Federal prosecutors have been frustrated in their attempts to convict child buyers under the existing laws because purchasing or selling a child is not presently a crime.[522] In one case involving the sale of children for use in the production of pornography the only resort was for the Assistant United States Attorney to prosecute the offender for an immigration violation.[523]

Specific legislation would provide additional protection for children and curb the production and distribution of child pornography. Federal prosecutors would have an additional tool available to further the goal of child protection.

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[521] This data base should be coordinated with the information system recommended to law enforcement agencies.

[522] Miami Hearing, Vol. II, Joyce Karlin, p. 170.

[523] Id.

## B. RECOMMENDATIONS FOR STATE LEGISLATION

### RECOMMENDATION 44:

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, CHILD PORNOGRAPHY STATUTES TO INCLUDE FORFEITURE PROVISIONS.

For a general discussions of the use of forfeiture provisions, see, Chapter 2 of this Part.

### RECOMMENDATION 45:

STATE LEGISLATURES SHOULD AMEND LAWS, WHERE NECESSARY, TO MAKE THE KNOWING POSSESSION OF CHILD PORNOGRAPHY, A FELONY.

The United States Supreme Court has called child pornography "a serious national problem."[524] In New York v. Ferber, the Court said that child pornography constitutes a permanent record of the children's participation in sexual activity, and the circulation of the pornography exacerbates the harm to the children. If the sexual abuse of children in pornography is to be curtailed the production and distribution network must be eliminated.525

Investigators have identified several uses of child pornography. The first use by pedophiles is for sexual arousal and gratification.[526] While some pedophiles only collect child pornography and fantasize through it, many have used it as a device to aid in the production of their own child pornography.

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[524] New York v. Ferber, 458 U.S. 747, 749(1982).

[525] Id. at 759-60.

Child pornography is often used as part of a method of seducing child victims.[527] A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having "fun" participating in the activity.[528] From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography.[529]

A pedophile offender will use child pornography in which the children appear to be having a good time.[530] The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.

Child pornography is also used to illustrate the activities in which the pedophile wishes a child to engage.[531] In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.

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[526] K. Lanning, Collectors, in Child Pornography and Sex Rings 86(A. Wolbert Burgess ed. 1984).

[527] Id.

[528] U.S. Department of Justice, Federal Bureau of Investigation, Child Molesting: A Behavorial Analysis for Law Enforcement 61 (1986).

[529] Id.

[530] Id.

Pornographic depictions of a child may be used to blackmail the child.[532] The pedophile offender will use the pictures to intimidate the child. The pedophile offender will threaten the child with showing the pictures to others if the child does not cooperate.

Child pornography is also seen as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors.[533] This subjects a child to repeated victimization by countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies.[534] Child pornography which may have orginated as a homemade item may eventually be sold to a commercial child pornography publication.[535]

Child pornography has a life of its own. It is a permanent record of the victimization and sexual abuse of the child.[536]

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[531] Child pornography magazines frequently include pictures of children viewing child pornography and replicating the poses or scenes depicted therein. Miami Hearing, Vol. I, R.P. "Toby" Tyler, p. 176A4.

[532] Miami Hearing, Vol. II, Paul Der Ohannesian II, p. 51; See also, K. Lanning, Collectors, in Child Pornography and Sex Rings 86(A. Wolbert Burgess ed. 1984).

[533] K. Lanning, Collectors, in Child Pornography and Sex Rings 86(A. Wolbert Burgess ed. 1984).

[534] Id.

[535] Id.

[536] Miami Hearing, Vol. I, William Dworin, p. 30.

The depictions are timeless and may be distributed and circulated throughout the world for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again.[537]

The harms to children from child pornography which the Supreme Court outlined in New York v. Ferber occur as a result of the existence of the material itself.[538] The enactment of criminal penalties for the possession of child pornography is essential if these harms are to be effectively curtailed.

Several states have recently recognized the inherent harm in child pornography and have enacted legislation prohibiting the possession of such material.[539] Only recently has this type of

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[537] Washington, D.C., Vol. II, John, p. 47-48.

[538] 458 U.S. 747(1982).

[539] See, e.g., "Sexual exploitation of a minor; classification A. A person commits sexual exploitation of a minor by knowingly:

> 1. Recording, filming, photographing, developing or duplicating any visual or print medium in which minors are engaged in sexual conduct.
>
> 2. Distributing, transporting, exhibiting, receiving, selling, purchasing, possessing or exchanging any visual or print medium in which minors are engaged in sexual conduct.
>
> B. Sexual exploitation of a minor is a class 2 felony." Ariz. Rev. Stat. Ann. S13-3553(1984);
>
> "A person who has in possession a photographic representation of sexual conduct which involves a minor, knowing or with reasons to know its content and character and that an actor or photographic subject in it, is guilty of a gross misdemeanor." Minn. Stat. S617.247(1984);
>
> "A person who knowingly and willfully has in his possession any film, photograph or other visual presentation

legislation met any constitutional challenge.[540] This challenge has been premised on the Supreme Court's ruling in Stanley v. Georgia.[541]

In Stanley, police executed a search warrant on the defendant's residence seeking evidence of a suspected bookmaking operation.[542] They located three reels of eight millimeter film in a desk drawer and upon viewing the films, they charged the defendant with possession of obscene matter.[543] He was convicted before a jury.[544] The Supreme Court reversed the conviction and held that "the mere private possession of obscene matter cannot constitutionally be made a crime."[545]

The first constitutional challenge to a state statute prohibiting the possession of child pornography came on December

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depicting minors engaging in or simulating, or assisting others to engage in or simulate sexual conduct is guilty of a misdemeanor." Nev. Rev. Stat. S200.730(1984);

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(5) Possess or control any obscene material, that has a minor as one of its participants. With purpose to violate division (A)(2) or (4) of this section." Ohio Rev. Code Ann. S2907.321(1984).

[540] Ohio v. Meadows, No. 84 CRB 25585, Slip op. (1st Dist. Dec. 18, 1985) cert. granted (Ohio Apr. 9, 1986) (No. 86-233).

[541] 394 U.S. 557(1969).

[542] Id. at 558.

[543] Id.

[544] Id. at 558-59.

[545] Id. at 559.

1, 1985. The first appellate district in Ohio found the state law prohibiting possession of child pornography[546] to be unconstitutional.[547] The analysis used in invalidating the statute was based upon the rationale of Stanley v. Georgia[548]. The Ohio statute was declared unconstitutional because the state could not punish the mere private possession of magazines "which depicted minors . . . engaging in sexual activity."[549] New York v. Ferber[550] was distinguished on the grounds that it dealt with distribution and not mere posssession of child pornography.551 In finding the statute unconstitutional the Ohio court placed great significance on the language in Stanley where the Supreme Court rejected the contention by the state of Georgia that to eliminate the traffic in obscenity, it is necessary to bar mere private possession by an individual.[552]

In United States v. Miller,[553] the United States Court of

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[546] R.C. 2907.321(a)(5) (1985).

[547] Ohio v. Meadows, No. 84 CRB 25585, Sip op. (1st Dist. Dec. 18, 1985), cert. granted, (Ohio Apr. 9, 1986) (No 86-233).

[548] 395 U.S. 557(1969).

[549] Ohio v. Meadows, No. 84 CRB 25585, Slip. op. (1st Dist. Dec. 18, 1985); cert. granted, (Ohio Apr. 9, 1986) No. 86-233).

[550] 458 U.S. 747(1982).

[551] Ohio v. Meadows, No. 84 CRB 25585, Slip. op. at 9 (1st Dist., Dec. 18, 1985); cert. granted (Ohio Apr. 9, 1986) (No. 86-233).

[552] Id. at 7.

[553] 776 F.2d 978(11th Cir. 1985), cert. denied. 54 U.S. L.W. 3698 (U.S. Apr. 22, 1986) (No. 85-1177).

Appeals for the Eleventh Circuit recently upheld the conviction of a defendant who received child pornography from Europe through the mail.[554] The defendant contended that 18 U.S.C. S2252 (a)(a) violated[555] his right to privacy and relied on *Stanley* for his claim that the statute was unconstitutional.[556] The court rejected the defendant's argument that the statute only applies to individuals who intend to distribute child pornography.[557] However, in considering the privacy issue, the court said "prior decisions on the issue of the right to possess obscene materials are controlling in our analysis of this case.[558]

The court relied on several obscenity decisions in which the Supreme Court rejected the argument that *Stanley* created a right to import or receive obscene materials for private use.[559] The court concluded that *Stanley* cannot be expanded to create a right to receive child pornography through the mail.[560]

Any reliance on the rationale of *Stanley* or other obscenity cases with respect to a prohibition against the possession of child pornography is misplaced. Stanley upheld an individual's right to privately possess obscene material.[561] The prevailing obscenity standard at the time of the Stanley decision was contained in Roth v. United States.[562] Roth has since been modified in most jurisdictions by Miller v. California.[563]

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[554] *Id*.

[555] This provision of the Child Protection Act provides penalties for any person who "knowingly receives or distributes any visual depiction . . . ."

[556] 776 F.2d at 980.

[557] *Id*. at 979.

[558] *Id*. at 980 n. 4.

[559] *Id*. The court of appeals relied on *United States v. Reidel*, 402 U.S. 351(1971); *United v. 12 200 Ft. Reels*, 413 U.S. 123(1973); *United States v. 37 Photographs*, 402 U.S. 363(1971); *United States v. Orito*, 413 U.S. 139(1973).

[560] *Id*. at 981.

In New York v. Ferber,[564] the Supreme Court upheld a New York law prohibiting the promotion of sexually explicit depictions of children that were not obscene under Miller.[565] In Ferber, the Court reasoned that the Miller standard, like all general definitions of what may be banned as obscene, does not reflect the state's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. The question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have sexually exploited a child through its production. In addition, a work which, taken as a whole, contains serious literary, artistic, political or scientific value may nevertheless embody the most grevious form of child pornography. The Supreme Court reasoned in Ferber, "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value. Memorandum of Assemblyman Lasher in Support of S263.15. We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem."[566]

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[561] 394 U.S. at 559.

[562] 354 U.S. 476(1957).

[563] 413 U.S. 15(1973).

[564] 458 U.S. 747(1982).

[565] Id. at 760-61.

Any analysis concerning the constitutionality of laws prohibiting the possession of child pornography should not be made as a parallel to obscenity statutes. The Supreme Court has clearly distinguished the standards to be applied to child pornography laws and adult obscenity statutes.567

The Supreme Court stated in Ferber that "the nature of the harm to be combatted requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age."[568] The Court went on to clarify its statement by noting that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."569

The obscenity precedent is clearly inapplicable to a challenge against a statute in which the offense described

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566 Id. at 761.

567 458 U.S. 747(1982).

568 Id. at 764.

569 Id. at 764-65.

clearly involved visual depictions of children engaged in sexual activities.[570]

The rationale underlying the Supreme Court's ruling in *Stanley* is vastly different from that in *Ferber*. In *Stanley*, the Court upheld the defendant's right to "read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home . . . free from state inquiry into the contents of his library."[571] The Court also found, at that time, "little empirical basis" for the assertion made by the state of Georgia that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."[572] However, the Court added in a footnote:

> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.
>
> *Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials*. See, e.g., 18 U.S.C. S793 (d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . ." In such cases, *compelling reasons may exist for over-*

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[570] *Ohio v. Meadows*, *supra* note 540, at 24; 18 U.S.C. S2252(a)(2).

[571] 394 U.S. at 565.

[572] *Id*. at 566. This Commission has found evidence of harm from exposure to pornography based upon ecidence produced since the *Stanley* decision, *See*, Textual discussion of harms in Part Two, *supra*.

riding the right of the individual to possess those materials.[573]

While *Ferber* admittedly dealt with a statute prohibiting the distribution of child pornography, the decision recognized compelling reasons for overriding the right of an individual to possess child pornography.[574] The Court found that "it is evident beyond the need for elaboration that a state's interest in safeguarding the physical and psychological well-being of a minor is 'compelling'.[575] While the Court in *Stanley* found little evidence then existing that exposure to obscene materials may lead to deviant sexual behavior or crimes of violence,[576] the Court clearly states in *Ferber* that "the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[577] Child pornography constitutes a permanant record of the sexual abuse of the child and the harm to the child is exacerbated by the circulation of the material.[578] The very existence of child pornography harms the children who are depicted. According to one child psychiatrist quoted in Ferber, "the victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child."[579] With respect to obscene materials in Stanley, the Court found the privacy rights of the individual to be the overriding concern. In Ferber, however, the Court clearly found the harm suffered by minors to be of paramount importance. The focus of the protection constitutes a major distinction between these two landmark decisions. The Ferber Court's concern for minors included the consideration that when child pornography is produced and distributed, the child's privacy interests are violated.[580]

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[573] *Id*. at 568, n. 11.

[574] *Id*. at 568.

[575] *Id*. at 756-57.

[576] 394 U.S. at 566.

[577] 458 U.S. at 758.

[578] *Id*. at 759.

The Court in Stanley rejected the argument that prohibition of the possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution.[581] In Ferber, the Court recognized that it may be difficult, if not impossible, to stop the sexual exploitation of children by pursuing only those who produce child pornography.[582] Citing the clandestine nature of the child pornography trade, the Court noted that "the only practical method of law enforcement may be to dry up the market for this material . . . ."[583] The prohibition of the mere possession of child pornography is a necessary incident to "drying up the market" for a product the Supreme Court has found to be extremely harmful to the youth of the nation. Such laws are also entirely consistent with the objectives sought to be attained by the Court in Ferber and should not be confused with other considerations relevant in the obscenity law context.

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[579] Id. at n. 10.

[580] Id. at 758, n. 9.

[581] 394 U.S. at 567.

[582] 458 U.S. at 760.

[583] Id.

RECOMMENDATION 46:

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, LAWS MAKING THE SEXUAL ABUSE OF CHILDREN, THROUGH THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS, A FELONY.

The sexual exploitation of children is the basis for the production and distribution of child pornography.[584] The production and distribution of child pornography is done in a largely clandestine fashion which makes law enforcement efforts to curb the dissemination more difficult.[585]

The classification of an offense of the sexual abuse of children in connection with child pornography as a felony gives notice to child pornographers and child sexual abusers who produce child pornography that they will be dealt with in a serious manner. An offense classified as a felony receives more attention within the prosecutor's office than the same offense classified as a misdemeanor. The enhanced priority will undoubtedly lead to more effective enforcement and prosecution.

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[584] Miami Hearing, Vol. I, William Dworin, p. 30.

[585] Washington, D.C., Hearing, Vol. I, Daniel Mihalko, p. 145.

RECOMMENDATION 47:

STATE LEGISLATURES SHOULD ENACT LEGISLATION, IF NECESSARY, TO MAKE THE CONSPIRACY TO PRODUCE, DISTRIBUTE, GIVE AWAY, OR EXHIBIT ANY SEXUALLY EXPLICIT VISUAL DEPICTIONS OF CHILDREN OR EXCHANGE OR DELIVER CHILDREN FOR SUCH PURPOSES A FELONY.

Individuals involved in the child pornography trade may often form networks with local, national and international connections.[586] A clergyman who operated a farm for wayward boys used the boys who lived on the farm to engage in sexual acts with sponsors of the farm. The sexual activities episodes were filmed and sold as souvenirs to the sponsors.[587]

In another circumstance, a Boy Scout troop of forty boys was created to provide sexual services to the adult men who accompanied them on outings. The troop leaders also filmed the activities.[588]

Pedophile offenders and child pornographers use such networks as a means to trade, exchange, and traffic in child pornography.[589] They may also use the contacts they make through this network to locate potential child victims.[590]

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[586] Miami Hearing, Vol. II, Seth Goldstein, p. 285X6; During an investigation in Los Angeles California, police found a mailing list of 5,000 customers of child pornography distributor Catherine Wilson. Miami Hearing, Vol. II, Joyce Karlin, p. 149.

[587] Id.

[588] Id. at 285X18.

[589] Id.

The existence of these networks of pedophile offenders and child pornographers along with the magnitude of the harm they may inflict makes it imperative that state legislatures act, where existing laws are deficient, to make the consipiracy to produce, distribute, give away or exhibit any sexually explicit visual depictions of children or to exchange or deliver children for such purpose a felony.

RECOMMENDATION 48:

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, CHILD PORNOGRAPHY LAWS, TO CREATE A FELONY OFFENSE FOR ADVERTISING, SELLING, PURCHASING, BARTERING, EXCHANGING, GIVING OR RECEIVING INFORMATION AS TO WHERE SEXUALLY EXPLICIT MATERIALS DEPICTING CHILDREN CAN BE FOUND.

Many people who produce and exchange child pornography have created intricate networks of information. They may join together for the purpose of trading children or trading information about the children.[591] Some pedophiles and child pornographers have formed associations which have national membership.[592]

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[590] Id.

[591] Washington, D.C. Hearing, Vol. I, Daniel Mihalko, p. 147-48.

[592] The North American Man-Love Boy Association is commonly referred to as NAMBLA. NAMBLA publishes the Bulletin and supports laws that would abolish the minimum age for consensual

Since child pornography is primarily a covert cottage industry, pedophiles who are child sexual abusers may use various underground publications or child pornography publications to place advertisements for children or child pornography.[593] Advertisements often are presented in coded language[594] or they may be explicit and direct.[595] The ability to easily obtain information regarding the location of children and child pornography allows pedophiles and child pornographers who collect child pornography to continue the exploitation of children.

Legislation is needed to prohibit the advertising, selling, purchasing, bartering, exchanging, giving or receiving of information as to where children or child pornography may be found. The penalty for a violation of the new legislation should

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sexual acts. This group is recognized as an association of and for pedophiles. The Rene Guyon Society of which Tim O'Hara is founder and president, has the motto of "Sex before eight [years of age], or it's too late." PIE: Pedophile Information Exchange, has a worldwide newsletter which serves as a contact agency for pedophiles.

[593] Miami Hearing, Vol. I, R.P. "Toby" Tyler, p. 176A5.

[594] Coded advertisements may provide:

> "Family man seeks other with similar interest." Swing. Issue 45, p. 18. Dawn Media, San Diego, CA (1982);
>
> "Pretty mother with pretty young daughters invites inquiries from gentlemen anywhere, who are interested in meeting us or in photography." Lolita. Issue 48; Id.

[595] "Love them young and innocent! Will buy photos, magazines, video tapes of young girls or boys . . . ." (Display advertisement) Wonderland: Newsletter of the Lewis Carroll Collectors Guild, No. 6:6(1984). Id.

be a felony. Legislation directed at curbing the flow of child pornography and information related to its production and distribution will enable law enforcement agents to attack the methods of child sexual abusers.

It is well recognized that the advertisement of material which is illegal constitutionally may be prohibited.[596] Since child pornography is illegal, states may enact statutes to prohibit the advertising of such material. States may enact legislation which would regulate the exchange of this information and would assist in impeding the flow of child pornography. The Congress addressed this issue on an interstate level in the Child Protection Act of 1984.[597]

RECOMMENDATION 49:

STATE LEGISLATURES SHOULD AMEND, IF NECESSARY, LAWS TO MAKE THE ACTS OF CHILD SELLING OR CHILD PURCHASING, FOR THE PRODUCTION OF SEXUALLY EXPLICIT VISUAL DEPICTIONS, A FELONY.

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[596] *See*, *Central Hudson Gas & Electric Corp. v. Public Utility Service Commission of New York*, 447 U.S. 557(1980). In addressing the issue of regulating commercial speech, the Court formulated a four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advanced the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest. 447 U.S. at 466.

[597] 18 U.S.C. SS2251-2252(1985).

Participants in international and local child sex tours provide children for pornography and prostitution.[598] Some of these sex rings use child members to recruit new members[599] and involve adults using many different children.[600] Children are purchased or exchanged in the same way the resulting pornography is sold or traded.[601]

Children have been purchased from Mexico and the Dominican Republic.[602] Yakusa, an organized crime entity in Japan, is actively involved in the trading of children.[603] When these children are brought into this country they may be traded further, used in child pornography or tortured for sexual pleasure.[604] For example, a teacher in Los Angeles imported young boys from Guatemala and El Salvador for sexual activity.[605]

RECOMMENDATION 50:

STATE LEGISLATURES SHOULD AMEND LAWS, WHERE NECESSARY, TO MAKE CHILD PORNOGRAPHY IN THE POSSESSION OF AN ALLEGED CHILD SEXUAL ABUSER WHICH DEPICTS THAT PERSON ENGAGED IN SEXUAL ACTS WITH A

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[598] Miami Hearing, Vol. I, Kenneth Hermann, p. 119.

[599] Id.

[600] Id.

[601] Id.

[602] Id. at 124-25.

[603] Id. at 131.

[604] Id. at 121.

[605] Id. at 132.

MINOR SUFFICIENT EVIDENCE OF CHILD MOLESTATION FOR USE IN T PROSECUTING THAT INDIVIDUAL WHETHER OR NOT THE CHILD INVOLVED FOUND OR IS ABLE TO TESTIFY.

Law enforcement officers and prosecutors often are unable successfully obtain a conviction against an individual on charge of child molestation because they are unable to locate t child.[606] An amendment to state statutes which recognizes visu depictions of the molestation as sufficient evidence of t molestation, if all other elements of the crime can be prove will make current law enforcement efforts more effective.

Such visual depictions are nothing more than records actual child molestation.[607] Law enforcement efforts should n be barred because the children cannot be identified or located.

In New York, law enforcement authorities located photograp of an adult male engaging in numerous sexual acts wi children.[608] The identity of the adult is known to th authorities, but they can take no action against him for thos sexual offenses because the child depicted in the photograp cannot be identified.[609]

Police in Columbus, Ohio, seized photographs of an adul male engaged in sexual acts with two young girls aged nine an ten.[610] They could bring no charges for the child sexual abuse offense until the girls could be located.[611]

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[606] Miami Hearing, Vol. II, William Cassidy, p. 201-02.

[607] See, New York v. Ferber, 458 U.S. 747(1982).

[608] Miami Hearing, Vol. II, Paul Der Ohannesian, p. 64.

[609] Id.

RECOMMENDATION 51:

STATE LEGISLATURES SHOULD AMEND LAWS, IF NECESSARY, TO ELIMINATE REQUIREMENTS THAT THE PROSECUTION IDENTIFY OR PRODUCE TESTIMONY FROM THE CHILD WHO IS DEPICTED IF PROOF OF AGE CAN OTHERWISE BE ESTABLISHED.

Prosecutors are often unable to produce the victim of child pornography to testify at trial as to his or her age.[612] The amendment would allow testimony from a third party as to the age of the child depicted. The testimony may come from relatives or friends of the child if the child is identified but he or she is not located. In addition the prosecution may use an expert witness to testify as to the age of the child based upon physiological characteristics.

The testimony based upon the depictions should be used only for proof of age. The depictions, when entered into evidence, should serve as the basis for this testimony from an expert or other qualified person as to the age of the child shown.

Prior to 1985 a child pornography prosecution in Maryland could not go forward unless the child depicted in the material was present to testify that he or she was under the age of sixteen at the time the pornography was produced.[613] Many cases were not prosecuted because this element of proof could not be met when the child victims could not be located.[614] The Maryland legislature enacted a law providing that of a child's age may be proved by:

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[610] Miami Hearing, Vol. II, William Cassidy, p. 201-02.

[611] Id.

[612] Id. at 204.

1. personal inspection of the child.
2. oral testimony of age.
3. expert medical testimony.
4. observation of the child as depicted in the material.
5. any other method authorized by applicable law or rules of evidence.[615]

States may find the approach taken by the Maryland legislature an effective method to overcome the barriers associated with determining the age of a child pornography victim. This approach allows the use of several alternate forms of reliable evidence.

RECOMMENDATION 52:

STATE LEGISLATURES SHOULD ENACT OR AMEND LEGISLATION, IF NECESSARY, WHICH REQUIRE PHOTO FINISHING LABORATORIES TO REPORT SUSPECTED CHILD PORNOGRAPHY.

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[613] Miami Hearing, Vol. II, Alfred Danna, p. 283.

[614] Id.

[615] Miami Hearing, Vol. II, Alfred Danna, p. 284J.

Pedophile offenders privately produce a great quantity of the child pornography.[616] Some child pornographers may have facilities in their homes to develop the photographs, but many producers most must use commercial photo finishing laboratories.[617]

Effective law enforcement practices should include efforts to reach the photo finishing process. One Federal prosecutor told this Commission,". . . there can be little doubt that photo finishers provide a key link in the chain of distribution of child pornography."[618] The photo finishers should be told clearly by law enforcement agencies the type of materials which are sought. The description may mirror the definition found in the Child Protection Act or their respective state laws.[619] Photo finishers also should be clearly told what responsibilities they have as well as the sanctions they may face for neglect of duty.

In an attempt to address this problem the California legislature amended the Child Abuse Reporting Law.[620] The

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[616] Washington, D.C., Hearing, Vol. I, Daniel Mihalko, p. 145.

[617] Id.

[618] Chicago Hearing, Vol. II, Frederick Scullin, p. 44.

[619] 18 U.S.C. S2252(1985).

[620] The statute provides in part,

> Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, videotape, negative, or slide in which a child is engaged in an act of obscene sexual conduct,

California law has resulted in an increased effectiveness in law enforcement efforts without a noticable incidence of spurious reporting.

Although state and local law enforcement officials must be aware of the special problems associated with automated photo finishers these establishments should not be excused from compliance.

RECOMMENDATION 53:

STATE LEGISLATURES SHOULD AMEND OR ENACT LEGISLATION, IF NECESSARY, TO PERMIT JUDGES TO IMPOSE A SENTENCE OF LIFETIME PROBATION FOR CONVICTED CHILD PORNOGRAPHERS AND RELATED OFFENDERS.

Many people convicted of child pornography and related offenses present unique problems for the judicial and penal systems. The recidivist rate for pedophile offenders who act on their sexual desires is second only to exhibitionists.[621]

An effective method of balancing the needs of the offender and the need to protect society may be the use of a sentence of lifetime probation. The state legislatures may amend their sentencing statutes to provide for supervised as well as

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except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3. Cal. Penal Code. S11165 (West 1985).

[621] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 271(3d ed. 1980).

unsupervised probation.

This amendment would give judges and probation officers a tool to moniter convicted child pornographers who pose a specific threat to society. The availability of unsupervised probation may become an important tool in the event the offender repeats the crime or a similar offense. Although unsupervised, the probation still holds the threat of future incarceration and allows the state to retain jurisdiction over the person.

## C. RECOMMENDATIONS FOR FEDERAL LAW ENFORCEMENT AGENCIES

### RECOMMENDATION 54:

THE STATE DEPARTMENT, THE UNITED STATES DEPARTMENT OF JUSTICE, THE UNITED STATES CUSTOMS SERVICE, THE UNITED STATES POSTAL INSPECTION SERVICE, THE FEDERAL BUREAU OF INVESTIGATION AND OTHER FEDERAL AGENCIES SHOULD CONTINUE TO WORK WITH OTHER NATIONS TO DETECT AND INTERCEPT CHILD PORNOGRAPHY.

Child pornography and the sexual abuse of children has overwhelming international aspects. While some child pornography originates in Europe many of the children depicted are American citizens.[622] A pedophile offender will put together a collection of photos either for his personal use, or in direct response to solicitations by one or more pornography distributors. The photos are then sent to a commercial distributor where they are compiled into a commercial-type publications.623

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[622] Miami Hearing, Vol. I, R.P. "Toby" Tyler, p. 156-57.

The pedophile offender may reside anywhere in the world. The countries where consumers have been identified include the United States, Canada, United Kingdom, France, Italy, Federal Republic of Germany, Belgium, Sweden, Denmark, the Netherlands, Czechoslovakia, Poland, Saudi Arabia, Egypt, Thailand, the Philiphines, Hong Kong, Singapore, Australia and Japan.

A commercial publication is distributed by mail thoughout the world, in addition, photos sets are sold to individual consumers. In one instance, photos were sold in sets of twelve photographs for $100, forty photographs for $300, or six hundred negatives for $5,000.

In another instance, positive photographic images (slides) were sent to a consumer by COQ International. The positives were used to make negatives and the negatives used to print photo sets. The sets were then sold, along with photos of models recruited by the United States producers for fifteen to thirty-five dollars for a set of six to ten. The same producer also offered special photo sets, custom ordered by the consumer, for two hundred to four hundred dollars per set. He called the service "sponsor a model."

In one case, two special agents from the United States

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623 These commercial publications include Lolitot, and Lolita.

Customs Service corresponded with a distributor of child pornography photos from Bangkok. Evidence was purchased by the agents with the intent to forward it to the customs attache in Bangkok, Thailand, and to refer to the case to the Thai authories. The Thais, however, preferred that the agents travel to Bangkok in the undercover capacities established in the correspondence. The agents would then purchase child pornography leading to an arrest.

While arrangments were being made for the agents to travel to Bangkok, it was discovered that the offender had been indicted in Detroit, Michigan, in 1981 for the distribution of child pornography.

A procedure for establishing undercover identities for agents to travel abroad was non-existent. After much difficulty appropriate identities were established with Justice Department and State Department assistance.

The offender had been selling sets of photographs to his customers, packaged discretely in letter class mail. In his final lettes to the agents before their departure for Bangkok, he offered to sell six hundred negatives for of $5,000. The agents and the Thais decided to pursue this purchase. One agent posed as a distributor of child pornography and the other as a pedophile.

Upon meeting the offender, the agents were led through Bangkok to avoid surveillance, the offender checked the agents' passports to ascertain their identities, and to ensure that they lawfully entered Thailand. He turned over the final installment of the last photo set purchased by one of the agents, and arrangements were discussed for the purchase of the negatives, use of the children he had promised in his correspondence, and the availability of heroin and marijuana. A meeting was arranged for the following day.

The offender was subsequently arrested based on the evidence contained in the correspondence to the customs agent prior to the arrest. Agents discovered several volumes of photographs, hundreds of photos and negatives and paperback books, all depicting explicit sexual activity between adults and children in his apartment. In addition, address books, sexual paraphernalia, travel diaries, and a copy of his 1981 indictment in Detroit were also discovered.

The defendant has plead guilty to all counts, and is scheduled to be sentenced in Thailand.

Child pornography magazine publishers and filmmakers obtain photographs and movies of children from offenders and reprint them for commercial sale.[624] The United States is also the largest consumer of internationally produced child pornography.[625]

To break this circle of distribution, agencies empowered to interact with foreign countries should exercise their powers to curb the sexual exploitation of children.

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[624] Id.

[625] Id.

These agencies face an initial hurdle caused by cultural differences and views of child sexuality. In contrast to the laws protecting children under the age of eighteen in the United States the age of majority in Northern Europe is generally sixteen.[626] In 1985 a bill was introduced before the Dutch parliament would lower the age of sexual consent to twelve.

The State Department, the United States Department of Justice and the United States Customs Service should continue efforts to negotiate with foreign countries to curb the flow of child pornography. In the past, these efforts have taken the form of suggesting legislative reforms. Although legislation which would effectively combat child pornography is still pending in Denmark, a Danish judge recently found child pornography to be offensive to public decency.[627]

To supplement the broad diplomatic efforts of the State Department specific federal agencies should continue their efforts to control the distribution of child pornography.[628]

Because most of the commercial pornography is imported from European sources, much of the burden of intercepting these material falls on the United States Customs Service. The Custom Service has the authority to search persons and items at th borders629 and Customs officers may detain and search any perso and property entering the United States without the necessity o a search warrant.630

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[626] Washington, D.C., Hearing, Vol. II, John Forbes, p. 278.

[627] Washington, D.C., Hearing, Vol. I, Daniel Harrington, p. 142.

[628] The United States Custom Service should take a leadership role in these efforts. The Customs Service has resources and expertise to conduct international investigations. The Customs Service should take advantage of the resources of the Untied States Postal Service and the Department of Justice particularly in domestic matters.

The Customs Service has detected a wide variety of obscen and child pornography materials in the mails including material which depict such acts as sado-masochism, urination, defecatio and bestiality.[631]

In January 1985 an inter-agency task force of agents fro the United States Postal Inspection Service, the United State Customs Service, Department of State and the Federal Bureau o Investigation visited several European source countries of chil pornography. These nations included Denmark, Sweden and th Netherlands. The agencies sought the assistance of the foreig governments to prevent the distribution of child pornography.

The Commission applauds the efforts of these departments an agencies but encourages enhanced cooperation and detectio efforts. A united effort is the only means to an effective an lasting remedy for the overwhelming child pornography proble. The agencies must continually increase their efforts to comba the flow of child pornography.

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629 Washington, D.C., Hearing, Vol. II, Richard Miller, p. 267.

630 Id.

631 Id.

RECOMMENNDATION 55:

THE UNITED STATES DEPARTMENT OF JUSTICE SHOULD DIRECT THE LAW ENFORCEMENT COORDINATING COMMITTEES TO FORM TASK FORCES OF DEDICATED AND EXPERIENCED INVESTIGATORS AND PROSECUTORS IN MAJOR REGIONS TO COMBAT CHILD PORNOGRAPHY.

The Law Enforcement Coordinating Committees (LECCs), as fully discussed in the Recommendations to Law Enforcement Agencies, provide the basis for effective law enforcement efforts. In the area of child pornography violations, LECCs should use information and assistance available from drug and alcohol abuse programs and other social service agencies. The expertise available through the various social service agencies should be tapped to provide law enforcement agencies with a completely effective enforcement effort.

RECOMMENDATION 56:

THE DEPARTMENT OF JUSTICE OR OTHER APPROPRIATE FEDERAL AGENCY SHOULD INITIATE THE CREATION OF A DATA BASE WHICH WOULD SERVE AS A RESOURCE NETWORK FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO SEND AND OBTAIN INFORMATION REGARDING CHILD PORNOGRAPHY TRAFFICKING.

The United States Department of Justice or other appropriate federal agency should create a data base as a source of central and accessible information regarding child pornography. This data base should be integrated into the data base recommended in the Law Enforcement Chapter of this report.[632]

The data base should include photographs obtained from searches, photographs of missing or abandoned children, the names of defendants and their contacts. It should also include records of the declination of prosecution of any case and the reasons therefor. The data base will allow federal, state and local law enforcement officials to draw on information gathered nationwide. The data base should allow an agency to submit as well as retrieve information.

RECOMMENDATION 57:

FEDERAL LAW ENFORCEMENT AGENCIES SHOULD DEVELOP AND MAINTAIN CONTINUOUS TRAINING PROGRAMS FOR AGENTS IN TECHNIQUES OF CHILD PORNOGRAPHY INVESTIGATIONS.

The most important factor in the effective enforcement of child pornography and related child sexual abuse laws is well-trained law enforcement personnel. Each law enforcement agency should have at least one member of its staff who is specifically trained to investigate and apprehend individuals involved in child pornography and related cases. At least one officer should be trained and possess the expertise necessary to conduct a thorough child sexual exploitation investigation. This training may be conducted through the Federal Law Enforcement Training Center.

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[632] This data base also should use the resources of the Child Pornography and Protection Unit (CPPU) established by the United States Customs Service. This CPPU data base has been designed to serve as a resource network for federal, state and local law enforcement agencies to store and receive information.

Law enforcement officers who are assigned to a child pornography or related unit face additional emotional pressures because of the insidious nature of child pornography. Officers may be required to view significant quantities of child pornography or deal with young victims during the course of their investigations. Training programs should emphasize the special psychological needs of law enforcement officers and they should offer assistance to alleviate the emotional stress.

A second area which training programs should address is the alienation an officer may encounter from other law enforcement officers.[633] These officers often receive minimal assistance and virtually no emotional support from their peers. The training programs should be used to educate officers assigned to a child pornography or related unit as to the types of behavior they may encounter. In addition, all officers within a department or agency should be trained with an awareness toward the difficulties encountered by officers who are assigned to child pornography or related cases.

Designated personnel should be required to participate in continuous training programs. These continuing education programs may be conducted through the LECC.[634] These programs have generally resulted in an increased awareness of the problem

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[633] New York Hearing, Vol. I, Carl Shoffler, p. 277-28.

[634] Miami Hearing, Vol. II, Paul Der Ohannesian, p. 61-62.

pages tightly bound

of child pornography and its relationship to sexual abuse.[635]

RECOMMENDATION 58:

FEDERAL LAW ENFORCEMENT AGENCIES SHOULD HAVE PERSONNEL TRAINED IN CHILD PORNOGRAPHY INVESTIGATION AND WHEN POSSIBLE THEY SHOULD FORM SPECIALIZED UNITS FOR CHILD SEXUAL ABUSE AND CHILD PORNOGRAPHY INVESTIGATION.

Agencies with large enough field offices in communities with adequate resources should include a specialized unit within the law enforcement agency to specifically investigate and related child pornography and related child sexual abuse cases. These trained agents in field offices will be able to actively investigate child pornography cases with an understanding of the particular local or regional problems. The specialized unit allows an officer to acquire and implement expertise in the area and enhance overall law enforcement efforts.

While this approach should not require additional personnel or expense, it will allow the agency to use its existing personnel more efficiently. Trained officers will be able to devote their time to these investigations. Other investigators should reassign the case to an expert within the unit to maintain efficiency and expertise.

The Commission believes that effective and efficient law enforcement is achieved through education, training and experience. These programs would enable law enforcement agencies to extract the maximum expertise from the personnel within their department.

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[635] Id.

RECOMMENDATION 59:

FEDERAL LAW ENFORCEMENT AGENCIES SHOULD USE SEARCH WARRANTS IN CHILD PORNOGRAPHY AND RELATED CASES EXPEDITIOUSLY AS A MEANS OF GATHERING EVIDENCE AND FURTHERING OVERALL INVESTIGATION EFFORTS IN THE CHILD PORNOGRAPHY AREA.

One of the most powerful investigative tools available to law enforcement agents is a search warrant. When used in child pornography and related child sexual abuse cases, a search warrant is unique in its ability to "make or break" an investigation.

Pedophile offenders are "collectors" and will retain photographs, magazines, movies, video tapes and correspondence relating to children for many years. Many of the items collected may not be child pornography. Collections often include "child erotica" which will include "innocent" depictions of children.[636] The discovery of these collections has often unlocked the door to a wealth of information by providing a record of the life and activities of an offender.

In a child pornography investigation executing a search warrant on the suspect's residence may yield photos of the individual engaged in sex with children thus supporting additional charges for child sexual abuse.[637] Pedophile offenders often maintain diaries recording their sexual encounters with children.[638] When a suspect uses a computer to store information regarding communications with other offenders or as a personal diary the search should also include access to computer equipment and records.[639]

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[636] Miami Hearing, Vol. I, Kenneth Lanning, p. 238.

In New York, police executed a search warrant on the residence of a suspected child molester and found he kept a complete folder on each of his victims including photographs and records of the dates the victim was in his home.[640] An experienced proscecutor has reported that in one half of child sexual abuse cases, proper searches recover photos of the defendant engaged in sexual acts with children.[641]

A collection of "child erotica" may help to identify the individual as an offender,[642] and may strengthen the prosecution case. This is especially true when proving intent is critical. A wrestling coach accused of fondling a juvenile who claims he was merely demonstrating a wrestling hold or technique would receive closer attention if a search of his residence yields child erotica in the form of writings about such acts and the pleasure he derived from them.

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[637] Miami Hearing, Vol. I, William Dworin, p. 44.

[638] Id. at 33.

[639] Miami Hearing, Vol. I, Paul Hartman, p. 106.

[640] Miami Hearing, Vol. II, Paul Der Ohannesian, p. 52.

[641] Id. at 77.

[642] Id. at 232, 235.

Law enforcement officers located child pornography consumers in many states as a result of the seizure of Catherine "Black Cathy" Wilson's mailing list.[643] One person on the list was an Episcopal priest living in Baltimore, Maryland.[644] Baltimore police were able to execute a search warrant on his home and seize the individual's album of sexually explicit photos of young boys based upon this information.[645] They found "love letters" from the victims and additional pornography.[646] Police subsequently were able to locate one of the boys who was molested by the priest.[647]

The United States Customs office, in Ft. Lauderdale, Florida, and United States Postal Inspectors were conducting a joint child pornography investigation in the Ft. Lauderdale area. During the course of the investigation, a business named "Sun Images" was identified as a producer and distributor of child pornography in the United States. Sun Images was located in Ft. Lauderdale, Florida. The owner and operator of Sun Images was identified. Further investigation revealed that Sun Images was also known as "Teens Unlimited" and "Young Stuff."

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[643] Id. at 240; Miami Hearing, Vol. I, Robert Northrup, p. 221-22.

[644] Miami Hearing, Vol. I, Robert Northrup, p. 212-13.

[645] Miami Hearing, Vol. II, Kenneth Elsesser, p. 147.

[646] Miami Hearing, Vol. II, Alfred Danna, p. 272-73.

[647] Id. at 275.

The investigators made an undercover buy of child pornography from the owner of the business. The child pornography was being sold in sets of six to ten photos for fifteen to thirty-five dollars a set. The owner was also selling "sponsorships" or custom ordered sets. These photos were available from two hundred to four hundred dollars per set, and would be taken of thirteen to eighten year old males, "posing" in any manner directed by the customer.

Based on the undercover purchase and other evidence, a search warrant was executed on the owner's residence. The investigators discovered a large quantity of child pornography at the residence and were able to obtain a second warrant for a storage facility in which the defendant kept the releases and applications from his models. He had two sets of applications and releases, one set with the actual dates of birth and one set showing the models to be over eighteen.

Also discovered during the search warrants was the defendant's method for printing and distributing the photographs, as well as his foreign source. COQ International of Denmark was selling the defendant's magazines and slides.

In February, 1985, the Contraband Enforcement Team, of the United States Customs Service, intercepted one magazine entitled Dream Boy No. 6 sent to Bradenton, Florida, address. The magazine had been sent from the Netherlands.

The Contraband Enforcement Team forwarded the magazine to the Special Agent in Charge, Tampa, Florida, for investigation. The Special Agent supervised an investigation which showed that the addressee had two previous seizures of child pornography. The first was a magazine entitled Lust Boys and the second was Child Pornography Advertisements.

Based on the previous seizures and other investigation, a controlled delivery of the Dream Boy magazine was made. Based on the controlled delivery, a search warrant was obtained for the addressee's residence.

United States Customs agents and United States Postal Inspectors surveilled the residence after the delivery of the magazine, while waiting for the warrant to be issued and delivered. While the surveillance was being conducted, the addressee arrived at his residence. Shortly afterward, a thirteen year old boy arrived at the residence on a bicycle and went inside the house. The warrant was delivered about five minutes later, at which time the agents went into the house. Upon entering the house, the agents discovered the offender on the couch with the boy. Although both the defendant and the boy were clothed, it was obvious that the boy had an erection. It appeared the agents had prevented further molestation from taking place.

Although the offender was arrested, he was granted bond with the provision that the had no contact with anyone under eighteen years of age. He was suspended from his place of employment as a guidance counselor at a middle school.

During subsequent investigation, three other children were identified, through seized photographs of them, and that information was turned overd to the local sheriff's department. The parents of the children refused to cooperate in the investigation because they did not want their children to testifiy in court.

In August, 1985, the offender was sentenced to five years in the Middle District of Florida. Four and one half years of the sentence were suspended.

When making a request for a search warrant investigators should seek to expand the scope of their search beyond child pornography. In one investigator's experience over ninety-five percent of the child pornography cases in which he used search warrants, both adult and child pornography were found in the possession of the child sexual abusers or child pornographers.[648]

Sexually explicit, "adult" material is often used to lower the inhibitions of child victims and should be an item sought.[649] The scope of the search should include not only the suspect's home but also his or her office, car and any other known place of habitation or storage. Pedophiles who are are involved in child sexual abuse are rarely without some portion of their child pornography in close proximity and often keep materials in several different places. Warrants should be drafted to include wide range of materials under the suspect's control in a variety of locations.[650]

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[648] Miami Hearing, Vol. I, William Dworin, p. 32.

[649] Miami Hearing, Vol. I, Kenneth Lanning, p. 225.

RECOMMENDATION 60:

FEDERAL LAW ENFORCEMENT AGENTS SHOULD ASK THE CHILD VICTIM IN REPORTED CHILD SEXUAL ABUSE CASES IF PHOTOGRAPHS OR FILMS WERE MADE OF HIM OR HER DURING THE COURSE OF SEXUAL ABUSE.

As part of expanding a law enforcement agency's investigation into child sexual abuse and child pornography all investigators should determine if children alleging sexual abuse were ever photographed in sexually explicit poses.

The most obvious way to find such information is to uniformly ask the child victim if photographs were taken. This technique should be employed for effective investigation and will undoubtedly highlight the interwoven connections between child sexual abuse and child pornography. An investigation of one offense should not eliminate an examination of related offenses.[651] Law enforcement officers should acknowledge that child sexual abuse is the basis for the production of child pornography.

RECOMMENDATION 61:

THE DEPARTMENT OF JUSTICE SHOULD APPOINT A NATIONAL TASK FORCE TO

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[650] Miami Hearing, Vol. I, Kenneth Lanning, p. 233-34.

[651] "In 90% of the child sexual exploitation causes . . . the children admit that at one time or another they were photographed." Miami Hearing, Vol. II, Dennis Shaw, p. 117.

CONDUCT A STUDY OF CASES THROUGHOUT THE UNITED STATES REFLECTING APPARENT PATTERNS OF MULTI-VICTIM, MULTI-PERPETRATOR CHILD SEXUAL EXPLOITATION.

The Commission has heard testimony regarding alleged multi-victim, multi-perpetrator child sexual molestation rings throughout the country. Few of the investigations of these rings have resulted in successful prosecutions. Multitudes of children have related experiences of being photographed by the alleged molesters, and others have commented on the "quick removal" of volumes of photographs prior to law enforcement searches. In the estimated twenty-five investigations throughout the country involving alleged ritualistic molestation of pre-school children not one photograph has been discovered to substantiate the children's stories.

Even in the face of clear medical evidence of sexual molestation of many of these children, the young ages of the children and the procedures in the criminal courts have combined to undermine and destroy effective prosecution. Given the striking similarities in the nature of the alleged sex crimes committed against children in these rings and the consistent inability of the local law enforcement and child protective services systems to effectively investigate and prosecute, it appears likely that future cases could result in similar unsuccessful efforts within the justice system.

A national task force should pursue extensive study for the purpose of establishing or discarding:

a. Possible links between multi-victim, multi-perpetrator child sex rings and pornography;

b. Possible linkages among multi-victim, multi-perpetrator child sex rings throughout the United States;

c. Production and distribution of child pornography through these orgainzed sex rings;

d. Possible links between sex rings, child pornography and organized crime.

The task force should then develop a report including recommendations for more effective investigation of child sexual exploitation cases reflecting these patterns of conspiracy. The task force would include among others, federal agency headquarters representatives. The task force should have the necessary budgetary and personnel resources to allow ongoing investigations in the field.

The task force should include interdisciplinary representatives and investigators with demonstrated skills and experience in multi-victim, multi-perpetrator child sexual exploitation cases.

## D. RECOMMENDATIONS FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES

### RECOMMENDATION 62:

LOCAL LAW ENFORCEMENT AGENCIES SHOULD PARTICIPATE IN THE LAW ENFORCEMENT COORDINATING COMMITTEES TO FORM REGIONAL TASK FORCES OF DEDICATED AND EXPERIENCED INVESTIGATORS AND PROSECUTORS TO COMBAT CHILD PORNOGRAPHY.

In recent years, the United States Attorneys have established Law Enforcement Coordinating Committees (LECCs) within each of the ninety-four districts.[652] The LECC is comprised of federal, state and local law enforcement agencies[653] and is designed to improve coordination and cooperation among agencies.[654] The LECC has proved to be an invaluable tool in effective law enforcement efforts. By coordinating the various agencies' efforts, a successful attack can be launched against any form of criminal activity from all sides. Customs can quickly determine a suspect's past involvement with foreign child pornography; the Postal Inspectors and local law enforcement officers can determine whether the suspect has been corresponding with other identified pedophile offenders and whether he is on any known mailing lists; and the FBI can identify the suspect's arrest history, employment history and lifestyle.[655]

New York has provided an example of the effective use of the

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[652] Chicago Hearing, Vol. II, Frederick Scullin, p. 37; See also, Recommendations for Law Enforcement Agencies in Chapter 2 of this Part.

[653] Chicago Hearing, Vol. II, Frederick Scullin, p. 37.

[654] Id.

[655] Miami Hearing, Vol. II, Joyce Karlin, p. 177B-C.

LECC for the investigation and prosecution of child pornography cases.[656] This example can also be used as a model for the LECC subcommittee specifically designed to address the problem of child pornography. In addition to general enforcement efforts the LECC may serve to make suggestions for regional or statewide programs.

RECOMMENDATION 63:

STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD DEVELOP AND MAINTAIN CONTINOUS TRAINING PROGRAMS FOR OFFICERS IN IDENTIFICATION, APPREHENSION, AND UNDERCOVER TECHNIQUES OF CHILD PORNOGRAPHY INVESTIGATIONS.

State and local agencies may participate in LECC sponsored training programs and should also participate in programs conducted through the Federal Law Enforcement Training Center. These agencies should also develop regional or local training programs. These localized programs should address general law enforcement techniques needed in child pornography cases as well as concerns peculiar to the region. These programs will enhance law enforcement efforts through a more coordinated base of communication among agencies within a geographic area.657

RECOMMENDATION 64:

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[656] Chicago Hearing, Vol. II, Frederick Scullin, p. 38-41.

[657] See also, The discussion, Recommendations for Federal Law Enforcement Agencies, in this Chapter.

STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD PARTICIPATE IN A NATIONAL DATA BASE ESTABLISHED TO SERVE AS A CENTER FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO SUBMIT AND RECEIVE INFORMATION REGARDING CHILD PORNOGRAPHY TRAFFICKING.

*See*, The discussion in Recommendations for Federal Law Enforcement Agencies in this Chapter.

RECOMMENDATION 65:

STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD HAVE PERSONNEL TRAINED IN CHILD PORNOGRAPHY INVESTIGATION AND WHEN POSSIBLE THEY SHOULD FORM SPECIALIZED UNITS FOR CHILD SEXUAL ABUSE AND CHILD PORNOGRAPHY INVESTIGATIONS.

*See*, The discussion in Recommendation for Federal Law Enforcement Agencies in this Chapter.

RECOMMENDATION 66:

STATE AND LOCAL LAW ENFORCEMENT AGENCIES SHOULD USE SEARCH WARRANTS IN CHILD EXPLOITATION CASES EXPEDITIOUSLY AS A MEANS OF GATHERING EVIDENCE AND FURTHERING THE OVERALL INVESTIGATION EFFORTS IN THE CHILD PORNOGRAPHY AREA.

*See*, The discussion in Recommendation for Federal Law Enforcement Agencies in this Chapter.

RECOMMENDATION 67:

STATE AND LOCAL LAW ENFORCEMENT OFFICERS SHOULD ASK THE CHILD

VICTIM IN REPORTED CHILD SEXUAL ABUSE CASES IF PHOTOGRAPHS OR FILMS WERE MADE OF HIM OR HER DURING THE COURSE OF SEXUAL ABUSE.

See, The discussion in Recommendation for Federal Law Enforcement Agencies in this Chapter.

## E. RECOMMENDATIONS FOR PROSECUTORS

### RECOMMENDATION 68:

THE UNITED STATES DEPARTMENT OF JUSTICE SHOULD DIRECT UNITED STATES ATTORNEYS TO PARTICIPATE IN LAW ENFORCEMENT COOORDINATING COMMITTEE TASK FORCES TO COMBAT CHILD PORNOGRAPHY.

See, The discussion in Recommendation for Federal Law Enforcement Agencies in this Chapter.

### RECOMMENDATION 69:

FEDERAL, STATE AND LOCAL PROSECUTORS SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

Prosecutors must be aware of the special considerations involving a child victim-witness. In many states children of a certain ages are presumed incompetent to testify. When the child is the only witness to a crime, such as child pornography and related crimes, prosecutors face special problems.

Prosecutors should work with other professionals including law enforcement agents, medical and mental health professionals and social service personnel, involved in child pornography cases to develop a courtroom protocol which maintains the integrity and emotional well-being of the child as well as preserving the constitutional rights of the defendant.

The task force should specifically address a number of issues. First, the number of repetitive questions asked of a child witness during the trial should be limited. A child may become easily frightened when repeatedly asked questions during the trial. This lengthy process increases the trauma and sense of guilt in victims associated with these crimes. The task force should develop methods of support for the child through this period while insuring the defendant's right to confrontation.

The prosecutor specifically may reduce this trauma by objecting to repetitive questioning on the grounds of harrassment.[658] The prosecutor should emphasize the special emotional frailty of the child in making the objection.

Prosecutors should develop guidelines to qualify a child as a competent witness. While very young children may be incapable of communication, those who are articulate should be presumed competent until the testimony demonstrates otherwise. In questioning a child witness prosecutors should be permitted to use age appropriate language and allow the child to respond in terms with which they feel comfortable. Children should be permitted to use anatomically correct dolls, if necessary, to demonstrate the manner in which they were posed or molested. The determination of credibility should be left to the jury as it is with any other witness.

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[658] Fed. R. Ev. 611 provides:

> (a) Control By Court. The court shall exercise reasonable control over the mode and order if interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Prosecutors should attempt to avoid delays in preliminary hearings and trials. Repeated delays add to the confusion and trauma of a child witness. Prosecutors may develop a priority calender for child pornography and related cases. These guidelines should be used to preserve the credibility of the child witness as well as eliminate the extent of the trauma caused by extensive delays in judicial procedures.

Prosecutors may also consider the use of closed circuit television to present the child's testimony. This would eliminate many of the distractions a child witness faces. A child is normally apprehensive in a new environment and will be reluctant to testify forthrightly. The closed circuit television could enable a child to testify and be subjected to cross-examination without being intimidated by the courtroom proceedings or the presence of the defendant.

The task force should also consider developing guidelines to coordinate criminal, civil and family law proceedings. In addition, the protocol should consider the use of grand juries in place of preliminary hearings. These guidelines would maintain the integrity of the judicial proceeding while eliminating any unnecessary trauma for the victims. All task force recommendations should clearly safeguard the constitutional protections afforded the accused.

RECOMMENDATION 70:

PROSECUTORS SHOULD ASSIST STATE, LOCAL AND FEDERAL LAW ENFORCEMENT AGENCIES TO USE SEARCH WARRANTS IN POTENTIAL CHILD PORNOGRAPHY CASES AND RELATED CHILD SEXUAL ABUSE CASES.

See, The discussion in Recommendations for Federal Law Enforcement Agencies in this Chapter.

RECOMMENDATION 71:

STATE, LOCAL AND FEDERAL PROSECUTORS SHOULD ASK THE CHILD VICTIM IN REPORTED CHILD SEXUAL ABUSE CASES IF PHOTOGRAPHS OR FILMS WERE MADE OF HIM OR HER DURING THE COURSE OF SEXUAL ABUSE.

See, The discussion in Recommendations for Federal Law Enforcement Agencies in this Chapter.

RECOMMENDATION 72:

STATE AND LOCAL PROSECUTORS SHOULD USE THE VERTICAL PROSECUTION MODEL FOR CHILD PORNOGRAPHY AND RELATED CASES.

The vertical prosecution system involves a single prosecutor handling a particular criminal case from its inception to its conclusion. In cases involving sexually abused or exploited children the young victims are often very frightened at the prospect of going into court. Sometimes the procedures that the victim must go through such as meeting new people and continuously repeating his or her story add to the trauma. When the same prosecutor handles the case it enables him or her to work with the victim on a continuing basis, gain the child's confidence, and help prepare the child for trial.

The vertical prosecution model also ensures that the case is not passed on to another prosecutor who may be unfamiliar with the facts or law involved in the prosecution. In California Governor George Deukmejian has established a grant program through the Office of Criminal Justice Planning to implement the vertical prosecution in model programs involving child sexual abuse and child pornography case.

## F. RECOMMENDATIONS FOR THE JUDICIARY AND CORRECTIONAL FACILITIES

### RECOMMENDATION 73:

JUDGES AND PROBATION OFFICERS SHOULD RECEIVE SPECIFIC EDUCATION SO THEY MAY INVESTIGATE, EVALUATE, SENTENCE AND SUPERVISE PERSONS CONVICTED IN CHILD PORNOGRAPHY AND RELATED CHILD SEXUAL ABUSE CASES APPROPRIATELY.

Recognizing that pedophile offenders and child pornographers pose unique problems in the judicial and penal systems judges and probation officers must be adequately educated. A judge or probation officer can have a significant and positive impact on the offender only if he or she is fully knowledgeable about the situation.

Offenders in child porngraphy cases rarely go to trial.[659] He or she generally enters a plea and proceeds to sentencing.[660] The judge does not have the benefit of the evidence obtained through trial before considering an appropriate sentence.

The judge must bear the burden of thoroughly assessing the defendant and the offense. The judge must actually view the child pornography to make this evaluation. The judge should not only be made aware of the nature of the pornography and related sexual abuse, but he or she must be fully aware of the quantity and type of material a defendant may possess. Many judges hold the mistaken belief that child pornography offenders are less insidious because they are professional people within the community.[661] A judge should examine the child pornography and be aware of the abuses attributable to its production in order to fully evaluate the offender before sentencing.

The judges and probation officers should be fully informed about the latest social science and medical information regarding pedophile offenders and child sexual abusers and their susceptibility to treatment or behavior modification. Therapists and other professionals who have studied pedophile offenders currently express a great deal of doubt as to the viability of rehabilitation of pedophiles.[662] Judges and probation officers should focus their attention toward the need to protect society and potential victims in addition to theraputic efforts for pedophile offenders.[663]

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[659] Miami Hearing, Vol. II, Joyce Karlin, p. 153.

[660] Id.

[661] Miami Hearing, Vol. I, Kenneth Lanning, p. 251.

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[662] The Commission has heard testimony from several law enforcement officers, prosecutors and therapists discussing the recidivist pattern of pedophile offenders. See, e.g., Miami Hearing, Vol. I, William Dworin, p. 22.

[663] The following is excerpts from a telephone conversation between a pedophile offender and a child victim. Law enforcement agents have stated that discovering and recording an actual conversation between an alleged pedophile and a victim is rarely discovered.

Subject. Oh, okay. Tell us when you're going to be nine.

Victim. May 12.

S. That's pretty soon Angel.

* * *

S. It's remarkable and I'm wondering if she's in her blue jeans?

V. No.

S. You're not in your blue jeans?

V. No, I'm in something like blue jeans.

S. Oh, I see, okay (Pause) blue jeans are falling out of fashion aren't they baby.

V. Yes.

S. Thcy don't wear them too much anymore.

V. Nope I don't even have any that fit. All I have is pants.

S. In other words you're going out of your blue jeans baby?

V. Uh, hum, I only have two pairs that still fit me.

S. That's amazing she is getting to be so curvy that she doesn't fit her blue jeans anymore. (Pause). I can tell she's grinning.

V. Laughs.

S. You're so sweet. You're just a precious little Angel. Are you still standing on your head baby?

V. No.

S. You know what I'm interested in, right? I'm interested in playing, right?

V. Right.

S. Is it alright if we have all three?

V. Uh, hum.

S. Okay.

V. Uh hum.

S. Honestly.

V. Yeah.

S. That's great we'll all three play then okay?

V. Okay.

S. In other words we'll tickle ours and you'll tickle yours right.

V. Right.

S. Okay, that's my girl.

V. You know what would be good?

S. What.

V. If you gave me your phone number because then sometimes I could call you if my Mom's not off on Tuesday or Thursday sometimes she's at work on Tuesday or Thursday.

S. Oh, I see, yes, I understand however sweetheart for a little while would you do me a favor and just bear with me, be patient with me, okay, for a little while?

V. Okay.

S. It'll be a good idea as a matter of fact sometimes if she's not off on Tuesday and Thursdays I could call and say let me speak to Sam and all you have to do is say you have the wrong number right.

V. Right.

S. And that would protect us. Can you take your panties off.

V. What?

S. Can you take your panties off while we're playing.

V. No.

S. Please, pretty please.

V. No.

S. She'll tell you it's alright.

V. Okay, I'm back.

S. Ask her if she thinks its alright.

V. You ask her.

S. Oh, okay, alright ah, sweetheart we were discussing the possibility of playing while you were gone from the phone and I wanted you to know all three of us to tickle ourselves while we were talking okay, alright, do you understand?

V. Uh, huh.

* * *

S. Let me put it this way, it would make me very happy if you took your panties off, okay.

V. Well, guess what.

S. What.

V. I can't.

S. You're so sweet, thank you so much Angel. Why?

V. Because.

S. Because of what.

V. Well, I'm downstairs and my brother and sister will be coming home. My sister always runs into my room.

S. Hold it now, you're downstairs.

V. Um,hmm.

S. And won't they see you when they first come in?

V. Yeah.

S. So what you need to do is hang up this phone and go upstairs.

V. Okay.

S. Okay, do me a favor go upstairs first and then come back down and hang this phone up.

V. Okay.

S. Or if you want me to hang this phone up and I'll call you back and you can answer upstairs.

V. Okay.

S. Alright, okay.

V. Okay.

S. Why don't we do that you hang up this phone up and I'll call you back and you can answer upstairs.

V. Okay.

S. Alright okay.

V. Okay.

S. Okay, you're going to hang up now . . .

V. (Hangs up).

* * *

(Phone rings)

V. Hello.

S. Now it's safe, isn't it?

V. Right, except for one thing.

S. Except for what.

V. My blinds are open.

S. Your what.

V. Blinds.

S. Oh, we'll hold on while you close them.

V. Okay.

S. Isn't she precious Angel.

* * *

S. She is just adorable and think about how thoughtful she is how intelligent she is. I mean didn't you think that was remarkable that she would say my blinds are open.

* * *

S. You betcha she's a very intelligent young lady. It's just delights me I'm so proud of her.

V. I'm back.

S. And I'll betcha that you've taken your panties off now.

V. Hmm, okay.

S. Did she take them off.

V. Um, Humm.

S. You're completely unclothed from the waist down you still have your blouse on though.

V. Right.

S. Okay, so when you hear your brother and sister come home you can put your clothes back on real quick, right.

V. Right.

S. That's good, isn't fun to do something sweetheart and know that you can get away with it that it's perfectly safe.

V. Yes.

S. It is fun isn't?

V. Um, hmm.

S. Have you ever, have you ever wanted to play with someone like this in person?

V. Um, hmm.

S. Tell us about it.

V. Well um you gave me the idea so I tried it.

S. With who?

V. I just called someone I don't know who they were.

S. Oh, you did?

V. But I looked it up in the phone book, I didn't look for any certain name. I just looked for the number.

S. Oh, I see in other words you got numbers out of the phone book.

V. Right.

S. Well, it's not I'll teach you how to make up numbers one of these days Sweetheart, it's really not necessary to go to the phone book. And, however, I want to find out you talked to someone?

V. Um, hmm.

S. And how old a person was it? Could you tell?

V. No.

S. Was it a man or a woman?

V. Man.

S. Did you tell him that you were tickling yours?

V. What?

S. Did you tell him that you were tickling yours?

V. No.

S. Did you get him to tickle his?

V. No.

S. Well, what did you all do Sweetheart?

V. Talked.

S. Talked about what.

V. Something.

S. Tell me about what, come on. About sex?

V. No.

S. What did you all talk about, tell me now.

V. Well, we just talked.

S. I see.

* * *

S. I see, but ah, you didn't talk about sex.

V. No.

S. And he didn't talk about wanting to be with you or to see you or meet you or something.

V. Well, he would like to come over to our house.

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S. He did, he said that.

V. Um, hmm.

S. He did.

V. But I said he couldn't.

S. . . . Angel, you didn't give him your address. I hope.

V. No.

S. Okay, golly that worried that kind of thing worries me.

* * *

S. Well, sweetheart its alright for you to talk to anyone on the phone anyone but don't give them your phone number and don't tell them your address. And certainly don't tell them your last name, okay.

V. Okay.

S. Because that way you'll be perfectly safe as long as you don't give them your phone number as long as you don't give them your address and as long as you don't give them your last name. Okay?

V. Okay.

S. That way you'll be perfectly safe. That way you can talk to anyone on the phone you want to as long as you don't tell them your phone number, your name, your address, okay.

V. Okay.

S. Those things ah, are if you gave them anyone of those things it could be dangerous to you sweetheart. It could be I'm not saying it would be normally, it probably wouldn't be but it could be see.

V. Um, hmm.

S. I don't want to make you unnecessarily afraid, I want you to makeup numbers and talk to people that's fine but protect yourself in the process and as long as you don't give them your phone number your address or your name you're safe. You can tell them your first name that's alright. (Pause).

Until an effective treatment method is widely accepted and implemented judges and probation officers must evaluate and supervise pedophile offenders carefully. Pedophile offenders who are incarcerated after an offense simply may use their time of confinement to plan their life and future offenses upon release. One pedophile offender wrote from his prison cell,

> I plan to get into photography in a bigger way when I get out. While I am in here I am studying photography and plan to set up a part-time business. I plan to be very discreet too. I was getting a little careless and look what it got me. This is one area where discretion

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Anyway, since you've talked to me, have you tickled yourself when you went to sleep?

V. Um, hmm, yeah.

S. Good. That's alot of fun isn't it. Sweetheart?

V. Um, hmm.

S. It is. Has it gotten to where it feels real good yet.

V. No.

S. Well, it will you just keep tickling it and it will, and when you go to sleep sometimes when you're tickling it does it get real juicy?

V. Does it get what.

S. Does it get real wet, real juicy?

V. No.

S. Well, it will. And do you know what it means, when it gets real wet and real juicy.

V. No.

S. It means that you're learning how to do it better.

and caution are absolutely essential.[664]

There are several problems which have prevented this program from being implemented. First, there is a lack of effective treatment plans. An effective treatment plan should be developed which results in a long term behavior modification with a significant reduction in recidivism rates.

A second problem associated with an incarceration and treatment program is a concern of its coercive nature. If a program is structured to make early release contingent upon cooperative participation in a treatment program, a correctional facility may be subject to allegations of coercion and violations of the offender's constitutional rights.

In the absence of an effective treatment program, a judge and a probation officer should be aware of the perpetual threat a pedophile offender poses to society. The only viable alternative in the absence of an effective treatment program is a substantial period of incarceration. The incarceration should effectively remove the offender from society and protect the community for a significant period of time.

Incarceration serves several different purposes. It may serve to deter potential offenders, to protect society from this individual and to provide retribution against the offender. Each of these factors need not be the basis for sentencing in every case.

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[664] Miami Hearing, Vol. I, William Dworin, p. 15.

The judges must examine each of these goals and determine which is the appropriate basis for sentencing. As previously discussed there are very few medical facilities that attempt to treat pedophile offenders.[665] In addition, incarceration often does not serve as a deterrent either to the specific offender or to other potential offenders.

The remaining goals of incarceration are the protection of society and retribution against the offender. Child sexual abuse or child pornography is one of the most insidious offenses known and the goal of retribution generally serves to reassure society of its values. Punishment also serves as an emotional support for the victim. This is particularly important in child pornography cases where the victim is left to feel guilty and ashamed.

The primary goal in sentencing should be to remove the pedophile offender so he or she does not present a threat to society. He or she must be removed for a substantial period of time. The Commission fully acknowledges these needs and recommends that a mandatory minimum sentence of two years be imposed on first time offenders. The sentences for recidivists should be substantially increased.

The welfare of the victim should remain the primary focus of the judge during the sentencing process. The sentence must also be sufficient to protect potential victims. The pedophile offender may continue to communicate with other pedophile offenders. One such communication was sent to an undercover police officer.

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[665] One such facility is the Massachusetts Treatment Center in Bridgewater, Mass.; See, Washington, D.C., Hearing, Vol. II, Richard Prentke, p. 65.

> "Now I was arrested and all my photographs, books, magazines, slides, flims, were confiscated. Since July 19, I have been here in a state hospital that treats men with sex offenses. I was first sent here for observation and committed here on November 3 for an indefinite period. That is why I was so happy to hear from you, as I no longer have the contacts with young girls I used to. I still have the same interests, but I am temporarily at a standstill. I was into photography quite a bit and managed to take some shots of Lisa and several of my students.[666]

The correctional facility must be kept apprised of these types of communiques and they should be considered during parole hearings or evaluations for release.

RECOMMENDATION 75:

JUDGES SHOULD USE, WHEN APPROPRIATE, A SENTENCE OF LIFETIME PROBATION FOR CONVICTED CHILD PORNOGRAPHERS.

Pedophile offenders present a continuing threat to society since there presently is no universally accepted course of treatment for a pedophile offender. In the absence of effective treatment a convicted pedophile offender must be continually monitored subsequent to his or her release. The most effective method of monitoring a pedophile offender is through the imposition of lifetime probation as a part of the initial sentence.

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[666] Miami Hearing, Vol. I, William Dworin, p. 14-15.

Lifetime probation gives probation personnel the ability to continually monitor the pedophile offender while he or she is able to attempt to rejoin society as a productive member. The probation should be conditioned upon special factors including prohibition of unsupervised contact with children as contact well as any contacts with other pedophile offenders.

A lifetime supervised probation term will require the dedicated efforts of federal and state probation officers. The officers must devote substantial periods of time to these individuals to ensure compliance with the terms of the probation.

In some situations the judge may impose a term of unsupervised lifetime probation. This would eliminate the enormous burden on the probation officers while maintaining legal control over the offender. The judge should carefully evaluate the offender and select the terms of probation which would be most effective and least burdensome on the penal and judicial systems.

RECOMMENDATION 76:

**PRE-SENTENCE REPORTS CONCERNING INDIVIDUALS FOUND GUILTY OF VIOLATIONS OF CHILD PORNOGRAPHY OR RELATED LAWS SHOULD BE BASED ON SOURCES OF INFORMATION IN ADDITION TO THE OFFENDER HIMSELF OR HERSELF.**

Probation officers, psychiatrists and psychologists have extensive contact with defendants and their counsel in the course of preparing presentence reports. Defendants and their counsel often provide court personnel with most of the information used in compiling these reports.

Information supplied by the defendant about himself or herself and the offense may be inaccurate or incomplete and it usually overlooks the victim's perspective. Sources of information other than the defendant must be tapped to give the sentencing judge the most accurate information. Such information should include but need not be limited to: investigative reports, victims' statements and interviews, interviews of witnesses and persons familiar with the offender's habits, a report of any guardian ad litem representing the victim; examination of physical evidence such as pornography created or possessed by the offender; a review of diaries, audiotapes, or videotapes created by the offender; and the offender's criminal, correctional, mental health, educational, military, and work records.667

Child sexual abusers often move to another city or state after public exposure or when they come under suspicion. The

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667 On January 20, 1984 a federal grand jury in the northern district of New York handed down a twelve-count indictment against a child pornographer. He eventually pled guilty to five counts of mailing child pornography and on May 4, 1984, was sentenced to ten years in prison on each of the five counts, to run concurrently, and ordered to undergo three months of psychiatric examination at a federal facility, due to his suicidal tendencies. The judge in this case later reduced the sentence to two years in prison followed by five years probation as a result of the psychiatric findings that were conducted by the United States Bureau of Prisons. Washington, D.C., Hearing, Vol. I, Daniel Mihalko, p. 156-57.

sentencing judge then should obtain records from jurisdictions in which an offender has previously resided. Victims, prosecutors and investigators should provide information at their disposal to those conducting presentence evaluations.

RECOMMENDATION 77:

STATE AND FEDERAL CORRECTIONAL FACILITIES SHOULD RECOGNIZE THE UNIQUE PROBLEMS OF CHILD PORNOGRAPHERS AND RELATED OFFENDERS AND DESIGNATE APPROPRIATE PROGRAMS REGARDING THEIR INCARCERATION.

In the Southern District of California, a defendant was convicted of transporting material involving the sexual exploitation of children and importing obscene merchandise.[668] The trial court sentenced the offender to the maximum punishment and requested a study by the Bureau of Prisons regarding what treatment he might receive.[669] The study was conducted by a Bureau of Prisons psychologist who had never previously treated a pedophile offender.[670] The psychologist found the defendant amenable to treatment, yet could not recommend a federal institution that was capable of providing the treatment.[671] A community treatment proposal was recommended, which in the prosecutor's view, failed to take into account the danger the defendant posed to the community if released.[672] The Federal Bureau of Prisons has acted to prevent a recurrence of this problem. To avoid any misinterpretation by the courts in the future, the Bureau of Prisons has instructed their mental health staff members to go beyond the specific mental health issues and to consider making recommendations for confinement based on factors other than treatment goals in cases where such a sanction is indicated.

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[668] Chicago Hearing, Vol. I, Joan Webber, p. 192.

[669] Id.

[670] Id. at 193.

[671] Id. at 195.

Pedophile offenders and child pornographers present a unique and difficult problem in correction facilities. The nature of the offenses for which they have been convicted make pedophile offenders and child pornographers the lowest class within the prison social system. They may be subjected to verbal and physical abuse by other inmates but this factor should not cause judges to avoid incarceration when necessary.

To provide humane incarceration pedophile offenders and child pornographers should receive specialized attention from correctional officials. Correctional departments may need to provide areas within a designated facility for convicted child sexual offenders to eliminate the threats of harm from other inmates. The facility should also attempt to develop specific therapy programs as they may become known for pedophiles in an attempt to prepare them for their reemergence into society.

The programs will be an attempt to recognize the special problems a pedophile offender or child pornographer encounters during his or her period of incarceration and should focus on safety and prevention problems.

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[672] Id. at 196.

RECOMMENDATION 78:

FEDERAL, STATE AND LOCAL JUDGES SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

See, The discussion in Recommendations for Prosecutors in this Chapter.

## G. RECOMMENDATIONS FOR PUBLIC AND PRIVATE SOCIAL SERVICE AGENCIES

RECOMMENDATION 79:

PUBLIC AND PRIVATE SOCIAL SERVICE AGENCIES SHOULD PARTICIPATE IN A TASK FORCE OF MULTI-DISCIPLINARY PRACTITIONERS AND DEVELOP A PROTOCOL FOR COURTROOM PROCEDURES FOR CHILD WITNESSES THAT WOULD MEET CONSTITUTIONAL STANDARDS.

Public and private social service agencies should lend their expertise to help develop appropriate courtroom procedures. Many of these guidelines should focus on the development of therapy programs for child victims.

In California, a group of preschool children were allegedly molested and photographed by teachers at the Children's Path preschool.[673] Physicians found conclusive medical evidence that fifteen of the children were sexually abused.[674] A two year old reported to her parents instances of controlled substance abuse, sodomy, and oral copulation. She also stated that photographs were taken.[675] Since the time the child told her parents of this situation, she has been receiving psychotherapy on a weekly basis. Her parents have also sought therapy.[676] None of the offenders were brought to trial because their victims were too young to be competent witnesses in court.[677]

Social services agencies should develop guidelines to assist child witnesses in the courtroom.[678] The programs which result may take the form of an advocate to assist the child through the judicial process. This person would be assigned to the child and would be concerned only with the welfare of the child rather than a particular judicial outcome.

## RECOMMENDATION 80:

## SOCIAL MENTAL HEALTH, AND MEDICAL SERVICES SHOULD BE PROVIDED FOR CHILD PORNOGRAPHY VICTIMS.

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[673] Miami Hearing, Vol. I, Laura Brennan, p. 93.

[674] Id. at 95.

[675] Id. at 93-94.

[676] Id. at 94.

[677] Id. at 95.

[678] For a more complete discussion see, Recommendations for Prosecutors in this Chapter.

In many cases, the official intervention into child pornography cases involves only legal and prosecutorial action against the perpetrator. Often, the identities of children appearing in pornographic photographs seized from the homes of pedophile offenders or child pornographers are never established. If the child pornographer is not a member of the family, the case will not be referred to a child welfare agency for protective social services. Child victims of pornography are frequently used as witnesses for the prosecution and subsequently abandoned by the social, medical and mental health services systems.

Child victims of pornography and their families should receive a full range of supportive services including competent medical evaluations and treatment, access to family therapy and peer support groups, legal counsel and guardians *ad litem*.

Because child pornography and child sexual abuse are so intrinsically related, certain treatment models for victims of child sexual abuse can be applied to victims of child pornography. Children who are involved in treatment for child sexual abuse often reveal that pornography was used by the perpetrator as a threat to prevent the child from disclosing the sexual relationship.

Model child sexual abuse crisis centers have been developed to integrate social, medical and mental health services for suspected child sexual abuse victims. Child sexual abuse centers can provide medical assessment, psychological, psychosocial evaluation and crisis intervention services to suspected victims of child sexual abuse and their families.679 Evaluation teams may consist of a physician, nurse practitioner, psychologist, social worker, and children's services worker. The multidisciplinary team approach can be used in the initial evaluation activities of the center and in the development of follow-up plans, including referrals for law enforcement and children's protective services, court action, and psychological treatment.

In addition, many runaway and homeless children are enticed into pornography or prostitution, or resort to theft in order to survive.680 Early intervention into their lives can provide a viable deterrent against other crimes. Without intervention,

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679 Model Crisis Center Programs include the San Diego Center for Child Protection and the Lost Angeles Child Sexual Abuse Family Crisis Center.

Los Angeles County also completed a study on runaway and homeless youths. Under the auspices of the Los Angeles County Board of Supervisors with participation of the Department of Children's Services, the Dependency Courts, law enforcement, and in conjunction with the private sector, a project has been proposed consisting of the following components designed to assist these children to develop meaningful lives:

--- Identification of child

--- Establish network of referral resources

--- Intake of child into system, including emergency shelter placement

--- Expedited court handling

--- Development of more suitable placement alternatives, treatment and handling resources, including a new shelter.

680 See, The discussion of Victimization.

these children may go on to more serious crimes when they are no longer desireable to pimps and pornographers.[681]

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[681] "Runaway and homeless youth come from highly disorganized families, and, in many cases, their behavior may be the result of past physical or sexual abuse. Fifty percent of the young people have not voluntarily left home but have been pushed out or encouraged to leave by parents. Fewer than half of these youngsters have a realistic prospect of ever returning to their families. Out on the street, these children are exploited by pimps, drug pushers and peddlers of pornography. Their health and emotional problems are severe. Runaways and homeless youth are unable to care for themselves adequately. Published research indicates that they exhibit stress and other psychological difficulties in excess of those experienced by non-runaways.

Although child abuse is generally perceived as a problem of early childhood, this study has uncovered another largely unrecognized abused population - adolescents. They need the community's care and concern just as much as their younger counterparts.

The community survey of experts reveals the lack of appropriate community resources. Agency staff themselves estimate that they are not coping with the situation adequately. The resource deficit is critically hindering a reasonable level of service provision. What scarce resources are available are not being utilized effectively because there is little rational planning, inadequate communication among agencies, and minimal coordination of effort. Each agency and service goes its own way, doing its best, but without reference to others serving the same population. The public and private sectors appear to operate as two separate subsystems, each in its own encapsulated orbit, with only sporadic interaction.

Our studies demonstrate that the runaway and homeless population is made up of different subpopulations with different characteristics, needs and service requirements. For example, there are multiple reasons for self-initiated breaking away from home, and also a variety of forces within the family that push the young person out involuntarily and prematurely. Planning for runaway and homeless youth requires differential diagnosis and specifically targeted patterns of service delivery. The analysis of existing research on program evaluation suggests that there are panaceas, no universally recognized and accepted program designs to solve the problem, although there are useful lessons and helpful ideas to be gleaned from studying the experiences of other communities across the country. Program development on the local level needs to be carefully coordinated, and adequately researched.

## RECOMMENDATION 81:

LOCAL AGENCIES SHOULD ALLOCATE VICTIMS OF CRIMES FUNDS TO PROVIDE MONIES FOR PSYCHIATRIC EVALUATION AND TREATMENT AND MEDICAL TREATMENT OF VICTIMS AND THEIR FAMILIES.[682]

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The family plays a central, but ambiguous role, according to our studies. Extant research indicates that family intervention is a highly effective strategy for many young people, and indeed might be the strategy of first choice in most situations. When reconciliation is possible, it should be given priority. However, research also shows that many families are so destructive, abusive and rejecting that children cannot wisely be returned to them. Almost fifty percent of the runaways need other options, including alternative residential care (such as group homes and foster care) for some, transitional services for those ready for emancipation, and basic survival services to nomadic youngsters committed to life in the streets.

This study has uncovered the intensive nature of this problem. We have not been able to ascertain the extensive nature of the problem, i.e., its numerical dimensions. The panel of approximation of the number of runaway and homeless youth in Los Angeles County. Knowing the dimension of the problem is essential to designing a solution. When society acknowledges a problem and determines to acquire accurate statistics, the numbers become available. This is the time to learn how many troubled youth must be provided for, and to undertake pilot and demonstration projects designed to develop effective programmatic responses." J. Rothman & T. David, Status Offenders in Los Angeles County, Focus on Runaway and Homeless Youth: A Study and Policy Recommendations, 3-4 (unpublished study).

[682] Senator Arlen Specter has introduced the Pornography Victims Protection Act. This act would allow an injured child the opportunity to recover damages from producers and distributors. This legislation would expand judicial remedies available to a victimized child and his or her family. Counselors and therapists must be qualified to assist the child and the family. This legislation would permit victims of child pornography and adults who are coerced, intimidated, or fraudulently induced into posing or performing in pornography to institute federal civil actions against the producers and distributors. A victim could recover treble damages and the costs of the action, as well as seek an injunction to prevent further dissemination of the pornography.

The legislation provides:

Be it enacted by the Senate and House of Representatives of the United Stated of America in Congress assembled. That this Act may be cited as the "Pornography Victims Protection Act of 1985".

Sec. 2 Section 2251 of title 18, United States Code, is amended -

> (1) in subsection (a), by striking out "subsection (c)" and inserting in lieu thereof "subsection (d)" and by inserting before the period at the end thereof the following: "or if such person knows or has reason to know that the minor was transported in interstate or foreign commerce for the purpose of producing any such visual depiction of such conduct":
>
> (2) in subsection (b), by striking out "subsection (c)" and inserting in lieu thereof "subsection (d)" and by inserting before the period at the end thereof the following: "or if such person knows or has reason to know that the minor was transported in interstate or foreign commerce for the purpose of producing any such visual depiction of such conduct":
>
> (3) by inserting immediately after subsection (b) the following:

"(c)(1) Any person who coerces, intimidates, or fraudulently induces an individual, 18 years or older to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if such visual depiction has actually been transported in interstate or foreign commerce or mailed, or if such person knows or has reason to know that the individual 18 years or older was transported in interstate or foreign commerce for the purpose of producing any such visual depiction of such conduct.

"(2) Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion under this subsection:

> "(A) that the person is or has been a prostitute;
>
> "(B) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography;

"(C) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography;

"(D) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue;

"(E) that anyone else, including a spouse or other relative, has given permission on the person's behalf;

"(F) that the person actually consented to a use of the performance that is changed into pornography;

"(G) that the person knew that the purpose of the acts or events in question was to make pornography;

"(H) that the person signed a contract to produce pornography; or

"(I) that the person was paid or otherwise compensated";

(4) in subsection (c), by striking out "(c)" and inserting in lieu thereof "(d)"; and

(5) by amending the heading to read as follows:

S2251. Sexual exploitation".

Sec. 3 (a) Section 2252 (a) (1) of title 18, United States Code, is amended by adding at the end thereof the following:

"(C) the producing of such visual depiction involved the use of an adult who was coerced, intimidated, or fraudulently induced to engage in sexually explicit conduct and the person knows or has reason to know that the adult was coerced, intimidated, or fraudulently induced; and

"(D) such visual depiction depicts such conduct; or".

(b) Section 2252 (a) (2) is amended by ---

(1) striking out "and" and the semicolon in clause (A) and inserting in lieu thereof "or the production of visual depiction involved the use of an adult who was coerced, intimidated, or

fraudulently induced to engage in sexually explicit conduct and the person knows or has reason to know that the adult was coerced, intimidated, or fraudulently induced; and

(c) the heading for section 2252 is amended to read as follows:

S2252. "CERTAIN ACTIVITIES RELATING TO MATERIAL INVOLVING SEXUAL EXPLOITATION."

Sec. 4. (a) Chapter 110 of part 1 of Title 18. United States Code, is amended by redesignating section 2252 as section 2261.

(b) Chapter 110 of part J of title 18, United States Code, is amended by inserting after section 2254 the following:

S2255. CIVIL REMEDIES.

"(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 2251 or 2252 by issuing appropriate orders, including ---

"(1) ordering any person to divest himself of any interest, direct or indirect, in any legal or business entity;

"(2) imposing reasonable restrictions on the future activities or investments of any person including prohibiting such person from engaging in the same type of legal or business endeavor; or

"(3) ordering dissolution or reorganization of any legal or business entity after making due provision for the rights of innocent persons.

"(b) The Attorney General or any person threatened with loss or damage by reason of a violation of section 2251 or 2252 may institute proceedings under section (a) and, in the event that the party bringing suit prevails, such party shall recover the cost of the suit, including a reasonable attorney's fee. Pending final determination, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper. For purposes of this section, a violation of section 2251 or 2252 shall be determined by a preponderance of the evidence.

"(c) Any victim of a violation of section 2251 or 2252 who suffers physical injury, emotional distress, or property damage

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as a result of such violation may sue to recover damages in any appropriate United States district court and shall recover threefold the damages such person sustains as a result of such violation and the cost of the suit, including a reasonable attorney's fee. For purposes of this section, a violation of section 2251 or 2252 shall be determined by a preponderance of the evidence.

"(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding.

"(e) Nothing in this section shall be construed to authorize any order restraining the exhibition, distribution or dissemination of any visual material without a full adversary proceeding and a final judicial determination that such material contains a visual depiction of sexually explicit conduct, as defined by section 2262 of this chapter, engaged in by a minor or by a person who was coerced, intimidated, or fraudulently induced to engage in such sexually explicit conduct.

S2256. CIVIL PENALTIES.

"(a) Any person found to violate section 2252 or 2252 by preponderance of the evidence shall be liable to the United States Government for a civil penalty of $100,000 and the forfeiture of any interest in property described in section 2254. The Attorney General may bring an action for recovery of any such civil penalty or forfeiture against any such person. If the Attorney General prevails he may also recover the cost of the suit, including a reasonable attorney's fee.

"(b) If the identity of any victim of an offense provided in section 2251 or 2252 is established prior to an award of a civil penalty made to the United States under this section, the victim shall be entitled to the award. If there is more than one victim, the court shall apportion the award among the victims on an equitable basis after considering the harm suffered by each such victim.

S2257. VENUE AND PROCESS.

"(a) Any civil action or proceeding brought under this chapter may be instituted in the district court of the United States for an district in which the defendant resides, is found, has an agent, or transacts his affairs.

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"(b) In any action under section 2252 or 2256 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshall of such judicial district.

"(c) In any civil or criminal action or proceeding under this chapter in the district court of the United States for any judicial district, a subpoena issued by such court to compel the attendance of witnesses may be served in any other judicial district except that no subpoena shall be issued for service upon any individual who resides in another district at the place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

"(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

S2258. EXPEDITION OF ACTIONS.

"In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine the action. The judge designated to hear and determine the action shall assign the action for hearing as soon as practicable and hold hearings and make a determination as expeditiously as possible.

S2259. EVIDENCE.

"In any proceeding ancillary to or in any civil action instituted under this chapter the proceedings may be opened or closed to the public at the discretion of the court after consideration of the rights of affected persons.

S2260. LIMITATIONS.

"A civil action under section 2255 or 2256 of this chapter

Sexual exploitation through the production of child pornography leaves a tremendous cost in its wake. This cost is in economic terms as well as human emotional devastation. Many children suffer physical and emotional damage as well as the effects of sexually transmitted diseases.

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must be brought within sex years from the date the violation is committed. In any such action brought by or on behalf of a person who was a minor at the date the violation was committed, the running of such six-year period shall be deemed to have been tolled during the period of such person's minority."

Sec. 5 (a) The section analysis for chapter 110 of part 1 of Title 18, United States Code, is amended to read as follows:

"CHAPTER 110 - SEXUAL EXPLOITATION

"See:
"2251. Sexual Exploitation.
"2252. Certain activities relating to material sexual exploitation.
"2253. Criminal forfeiture.
"2254. Civil forfeiture.
"2255. Civil remedies.
"2256. Civil penalties.
"2257. Expedition of actions.
"2259. Evidence.
"2260. Limitations
"2261. Definitions for chapter.
"2262. Severability.

(b) The chapter analysis for part 1 of title 18, United States Code, is amended by striking the item relating to chapter 110 and inserting in lieu thereof the following:

"110. Sexual Exploitation..........................2251".

Sec. 6 Chapter 110 of title 18, United States Code, is amended by inserting after section 2261 the following:

"If the provisions of any part of this Act or the amendments made by this Act, or the application thereof, to any person or circumstances is held invalid, the provisions of the other parts of this Act or the amendments made by this Act and their applications to other persons or circumstances shall not be affected."

An effective response to cases of suspected child sexual exploitation requires a sensitive and comprehensive medical examination of the child that will:

1. Accurately diagnose physical evidence of recent or past sexual assualt, and
2. Provide substantial documentation for protective or prosecutorial action.

Evidence of child sexual abuse is more difficult to obtain than evidence of other types of physical abuse which results in external bruising, lacerations, scarring or severe malnutrition. Obtaining any medical evidence of sexual abuse which results from the production of child pornography requires special expertise and special sensitivity to the needs of the child. Such evidence is only a component of the evaluation and interpretation of findings which must be used with caution and understanding.

Sexually exploited children often must also undergo extensive psychotherapy to restore their mental health. Therapy is costly and may often be outside the limits of ordinary medical insurance. Monies available in the state victims of crimes funds should be used to defray the cost of this evaluation and treatment. The distribution of monies from these funds also recognizes the real injury which these children have suffered.

## RECOMMENDATION 82:

CLINICAL EVALUATORS SHOULD BE TRAINED TO ASSIST CHILDREN VICTIMIZED THROUGH THE PRODUCTION AND USE OF CHILD PORNOGRAPHY

MORE EFFECTIVELY AND BETTER UNDERSTAND ADULT PHYCHOSEXUAL DISORDERS.

Clinicians should be trained in the types of problems that may be associted with child sexual exploitation which results from the production of child pornography.[683] Problems with

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[683] In addition to requiring certain individuals to report known and suspected cases of child maltreatment, California law now requires mental health professionals to complete coursework or training related to child abuse and neglect.

The Bill provides:

ASSEMBLY BILL NO. 141

ADDITION TO BUSINESS AND PROFESSIONS CODE, SECTION 28

The Legislature finds that there is a need to ensure that professionals of the healing arts who have demonstrable contact with child abuse victims, potential child abuse victims, and child abusers and potential child abusers are provided with adequate and appropriate training regarding the assessment and reporting of child abuse which will ameliorate, reduce, and eliminate the trauma of child abuse and neglect and ensure that reporting of child abuse in a timely manner to prevent additional occurrences.

The Psychology Examining Committee and the Board of Behavioral Science Examiners shall establish required training in the area of child abuse assessment and reporting for all persons applying for initial licensure and renewal of a license as a psychologist, clinical social worker, or marriage, family, and child counselor on or after January 1, 1987. This training shall be required on time for all persons applying for initial licensure or for licensure renewal on or after January 1, 1987.

All persons applying for initial licensure and renewal of a license a psychologist, clinic social worker, or marriage, family and child counselor on or after January 1, 1987, shall, in additional to all other requirements for licensure or renewal, have completed coursework or training in child abuse assessment and detailed knowledge of Section 11165 of the Penal Code. The training shall:

(a) Be completed after January 1, 1983.

(b) Be obtained from one of the following sources:

(1) An accredited or approved educational institution, as defined in Section 2902,, including extension courses offered by those institutions.

(2) An educational institution approved by the Department of Education pursuant to Section 94310 of the Education Code.

(3) A continuing education provider approved by the responsible board or examining committee.

(4) A course sponsored or offered by a professional association or a local, county, or state department of health or mental health for continuing education and approved by the responsible board.

(c) Have a minimum of 7 contact hours.

(d) Include the study of the assessment and method of reporting of sexual assault, neglect, severe neglect, general neglect, willful cruelty or unjustifiable punishment, corporal punishment or injury, and abuse in out-of-home care. The training shall also include physical and behavioral indicators of abuse, crisis counseling techniques, community resources, rights and responsibilities of reporting, consequences of failure to report, caring for a child's needs after a report is made, sensitivity to previously abused children and adults, and implications and methods of treatment for children and adults.

(e) All applicants shall provide the appropriate board with documentation of completion of the required child abuse training.

The Psychology Examining Committee and the Board of Behavioral Science Examiners shall exempt any applicant who applies for an exemption from the requirements of this section and who shows to the satisfaction of the committee or board that there would be no need for the training in his or her practice because of the nature of that practice.

It is the intent of the Legislature that a person licensed as a psychologist, clinical social worker, or marriage, family, and child counselor have minimal but appropriate training in the areas of child abuse assessment and reporting. It is not intended that by solely complying with the requirements of this section, a practitioner is fully trained in the subject of treatment of child abuse victims and abusers.

children may include generalized withdrawal or assaultiv behavior. Child victims may also display specific inappropriat sexual behavior or specific target sources of anxiety (e.g., me with beards).

Counselors treating these children must also be trained t work effectively with families and other caretakers of victim (e.g., foster parents, extneded family child card, profes sionals). Child caretakers need help to understand possibl future behaviors of child victims, alleviate anxiety and avoi creating unnecessary abnormal behaviors as a result of adul inappropriate over-reactive expectations. Parents of five yea old victims might be more understanding of and more effective i dealing with recurrent bedwetting or secual behavior if they ar prepared.[684]

Clinicians evaluating child pornogrpahy victims also nee training inlegal and judicial procedures to assure that th evaluation and counseling process does not conflict with th proper disposition of the criminal case.

RECOMMENDATION 83:

BEHAVIORAL SCIENTISTS SHOULD CONDUCT RESEARCH TO DETERMINE TH EFFECTS OF THE PRODUCTION OF CHILD PORNOGRAPHY AND THE RELATE VICTIMIZATION ON CHILDREN.

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[684] Anticipatory guidance as designed by the Americ Academy of Pediatrics (AAP) Health Care Service is a usefu model.

It is important that victim research examine the short and long-term effects of the sexual vicitimization of children. Dr. Roland Summit, a leading medical authority, expressed the need for additional research critical to this Commission.[685] An understanding of the behavioral pattersn of child victims is especially lacking. The child may be disbelieved upon disclosure, during investigation, or as a witness in court.[686] Parents or other child advocates may also be attacked for supporting their child's version of the offense.[687]

Behavioral scientists also should learn more of the characteristics of the child pornographer and the pedophile offender. These conclusions will be valuable to law enforcement agents, prosecutors, judges, parents, and therapists. This research will form the basis for a sound program to curb the sexual exploitation of children.[688]

Such research should include a systematic observation of the pornographic component of an experience separate from other criminal acts in cases that include pornography and other forms of child abuse. Research should also examine the effects of adult pornography on children.

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[685] Miami Hearing, Vol. I, Roland Summit, p. 209.

[686] Id. at 199, 216A1.

[687] Id. at 200.

[688] UCLA has recently received a federal grant to study long-term effects of exploitation on the McMartin Pre-School child victims.

## RECOMMENDATION 84:

STATES SHOULD SUPPORT AGE-APPROPRIATE EDUCATION AND PREVENTION PROGRAMS FOR PARENTS, TEACHERS AND CHILDREN WITHIN PUBLIC AND PRIVATE SCHOOL SYSTEMS TO PROTECT CHILDREN FROM VICTIMIZATION BY CHILD PORNOGRAPHERS AND CHILD SEXUAL ABUSERS.

The educational programs must inform children while at the same time preserving a child's innocence and basic trust. The program should avoid instilling any unhealthy fear or mistrust in children. It may focus on the difference between positive healthy affection and touching or contact which is harmful to the child. Training for parents and school personnel should center on how to identify cases and how to report the information to the proper agencies.[689]

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[689] California has developed the educational program, Child Abuse: Recognize and Eliminate (CARE). A description of the program follows for purposes of illustration.

### CARE PROGRAM

### Student Workshop Description

Over eighty percent of child molestations are perpetuated by adults known to the child. The majority of incidents of sexual abuse take place in the home of the abuser or the child. Boys are equally as vulnerable as girls. Child molesters cannot be identified easily; they come from all races, religions, professions, and socio-economic classes. Children can be taught to protect themselves from unwanted, uncomfortable and potentially abusive situations.

C.A.R.E. (Child Abuse: Recognize and Eliminate) is the Los Angeles Unified School District's extensive school-based educational program on child abuse prevention. The student component of CARE is an exemplary model of instruction for children in pre-kindergarten through grade six. Based on the concepts of self-esteem and self-protection, this instruction is conducted in small groups at the school by S.C.A.N. (School Child Abuse and Neglect) Team members. A SCAN Team is a group of on-site school personnel who have received intensive training in child abuse prevention and intervention. Student instruction is one component of this extensive school-based child abuse educational program.

The SCAN Team's role in presenting the student lesson is critical. Since all instruction is delivered by the same individuals, there is a strong assurance that consistency in the information presented is maintained and, that all the children receive this information. (The SCAN Team presents the student curriculum to all students every year). In addition, because SCAN Team Members are full-time, on-site certificated staff, any one or all of the team is available on a daily basis to attend to the needs, problems and/or concerns of any child at any time. If a child needs assistance one week, six weeks or six months after the initial presentation, a trained person known to the child is there to help. SCAN Team members return to the classrooms periodically to reintroduce themselves and remind children of their availability and willingness to meet and talk with the child at any time and for any reason.

The initial basic program includes a directed lesson, film, discussion and question/answer period, and an opportunity for immediate private counseling. The follow-up lesson which takes place approximately six weeks later, focuses on reinforcing the central concepts in a discussion and presenting a different film. The primary message of the instruction emphasizes the value of the child as a human being. The concepts are introduced and developed using a self-esteem approach:

you are valuable
you are the best person to protect yourself
you have rights
you can communicate
you have power
you can get help

Specific strategies -- say "no", get away and tell someone -- are presented in both the lesson and the film, "Better Safe than Sorry, II." The film presents real-life situations in a what-if format; students react with the children in the film to potentially abusive situations involving strangers, a neighbor and someone in the family. They learn to say "no" to an adult who is bothering them and that not all secrets should be kept. Telling how you feel is the best rule to follow even when it is another person making you feel funny, bad or uncomfortable. Children are told who to tell and specifically introduced to

RECOMMENDATION 85:

A MULTI-MEDIA EDUCATIONAL CAMPAIGN SHOULD BE DEVELOPED WHI INCREASES FAMILY AND COMMUNITY AWARENESS REGARDING CHILD SEXU EXPLOITATION THOUGH THE PRODUCTION AND USE OF CHILD PORNOGRAPHY

A multi-media program should inform families and communiti of the materials and seduction techniques used by chi pornographers and pedophile offenders. The child pornographer pedophile offender may befriend a potential victim, buy him her gifts, or take the child on trips. Pedophile offenders

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those at the school site who are available for help. Studen are instructed to keep telling until believed. Children lea they have a right to body privacy and that some parts of t body, "private parts," need special protection. After th practice various ways to say "no," they learn ways to remo themselves from uncomfortable situations. The concepts "It not your fault" and "It's right to tell" are emphasiz throughout.

After the lesson and film, children have an opportunity to questions. Strategies for protection are reinforced and priva crisis counseling is immediately available. Four to six wee later, the SCAN Team members review the concepts using anoth film, "Now I Can Tell You My Secret." At this time strategi are re-taught, and who and how to tell is re-emphasized. If child discloses or is identified as needing intervention referral, the SCAN Team members will report to the appropria agency and coordinate needed services.

The CARE student instruction stresses safety not fear. maintains a balance between addressing past and current victi and not scaring other children. I teaches children that th have rights. I emphasizes the child's self-worth and value. information provides children the skills necessary for sel protection in potentially abusive situations and gain t confidence to apply these skills. The goal of the instruction that children learn how to respond to any type of threateni situation. A secure child who knows he is valuable and trus his feelings is better prepared to recognize potential dangerous situations, react appropriately, and keep himself sa child pornographers may also volunteer their services to be near children in activities such as sports, daycare centers, schools or camps. Because of this seduction process, a child victim's sexual encounters with a pedophilic molester may never seem traumatic.[690] The subtle manner in which they abuse their victims necessitates a heightened awareness on the part of children and their parents. While parents or other adult caretakers may be uncomfortable in posing questions about sexuality to their children, parents may be more receptive to a trained professional who candidly answers such questions.[691] Each of these programs should list individuals or services in the community where parents or children may seek information or assistance. These facilities should incorporate a variety of social services as well as the availability of legal advice. They should also assemble information as to agencies which provide particular types of assistance.[692]

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[690] Miami Hearing, Vol. II, Ulrich Schoettle, p. 225-S.

[691] *Id.* at 239.

[692] This list should include information about the following agencies and services:

--- Child protective service agencies

--- Law enforcement agencies (particularly special juvenile or sex crimes unit)

--- Child abuse treatment referral systems

--- Rape crisis treatment systems

--- Specific child sex abuse treatment programs

pages tightly bound

## Chapter 4

## Victimization

RECOMMENDATION 86:

STATE, COUNTY AND MUNICIPAL GOVERNMENTS SHOULD FACILITATE THE DEVELOPMENT OF PUBLIC AND PRIVATE RESOURCES FOR PERSONS WHO ARE CURRENTLY INVOLVED IN THE PRODUCTION OR CONSUMPTION OF PORNOGRAPHY AND WISH TO DISCONTINUE THIS INVOLVEMENT AND FOR THOSE WHO SUFFER MENTAL AND PHYSICAL DISABILITIES AS A RESULT OF EXPOSURE OR PARTICIPATION IN THE PRODUCTION OF PORNOGRAPHY.

As described later in Chapters 1 and 2 of Part Five, victims of pornography may suffer a variety of physical and mental damages. The victimization may include coercion, intimidation, negative effects of forced consumption, physical assault and sexual harassment.

Resources currently exist for victims of sexual abuse and other crimes through victims compensation programs, mental health and medical treatment programs. However, if no crime is reported, as is often the case with pornography, the damages cannot be compensated by victims of crime funds. Furthermore, if mental health or medical staff are not aware of the special nature of pornography victimization, treatment may not be effective in rehabilitating the victim. Those currently involved in the production or forced into consumption of pornography are not aware of alternatives available to them, and they may never believe they can escape the victimization.

> Resources for victims of pornography should include:
>
> (A) emergency "safe houses" where persons needing short term refuge from production or forced consumption of pornography, (B) financial assistance for persons damaged by pornography who do not qualify for public assistance or victims of crimes funds, (C) development of public information materials to assist persons escape victimization through awareness of alternatives, (D) provision of job training and educational opportunities who have been denied such opportunities to victims who have been denied such opportunities because of financial losses, physical or mental damages incurred through production or forced consumption of pornography, (E) provision of specialized training for counselors and therapists to sensitize them to a special nature of pornography and related sexual victimization.

This training should include particular recognition of the correlated problems of substance abuse, and the allocation of resources to study short- and long-term effects of pornography on those who participate in its production and those who are forcibly exposed to it.

# APPENDIX A

The following questionnaire now used in New York and other major cities may serve as an example of the types of issues to be discussed.

"Pornography," as referred to in the question below, includes "men's entertainment" magazines such as Playboy, Penthouse, and Hustler, as well as hard-core publications showing explicit sex between men and women, between two women, between two men, and between adults and children. Such publications may show women or children tied up or hurt, women or children being penetrated by penises, fists, or objects, and women or children having sex with animals. "Pornography" also includes books, films, cable television programs, and video tapes showing these scenarios.

## IF THE ASSAILANT LIVED WITH OR WAS KNOWN TO THE VICTIM

1. Did/do you live with the man who assaulted you?
2. If so, what was/is your relationship?
3. If not, how do you know him?
4. Did/does your assailant use or collect pornography?
5. If so, what kind?
6. Do you know the specific names or titles of the magazines, films, programs or video tapes? If so, what are they?
7. Did/does he use pornography for masturbation?
8. Did/does he use it to get aroused before sexual relations?

9. Did he ever ask you to view pornography with him?

10. Did he ever pressure you to view pornography with him?

11. Did he ever force you to view pornography with him?

12. Was pornography used as part of your normal sexual encounters?

13. If so, how was it used?

14. Did he ever ask you to act out scenes from pornography?

15. Did he ever pressure you to act out scenes from pornography?

16. Did he ever force you to act out scenes from pornography?

17. Did he ever mention pornography in your sexual encounters?

18. did he ever ask you to pose for nude or pornographic photos or films?

19. Did he ever pressure you to pose for nude or pornographic photos or films?

20. Did he ever force you to pose for nude or pornographic photos or films?

21. Did he ever send nude photographs of you to a magazine or "wife-swapping" club newsletter?

22. Did you ever show nude photographs of you to his friends?

23. Did he ever sell nude photographs of you?

24. Did he refer to pornography when he assaulted you? For example, did he say anything like, "This is what women ask for in the magazines I read," or "This is what the woman did in the movie, and she loved it"?

25. During the assault, did he force you to act out scenes from pornography?

26. Did he, or anyone involved in the assault, take nude or pornographic pictures of you before, during, or after the assault?

27. Did he show you pornographic pictures or films prior to, or after the assault?

28. Did/does he use pornography to learn or teach you sexual

techniques? To teach you how to dress in a way that turns him on? To learn how to tie you up?

29. Does he use pornography to justify sex acts that you don't want to participate in? For example, does he show you pictures and say, "A lot of couples do this," or "Look how much she likes doing it."

30. Did/does he use "dial-a-porn" services? Frequent X-rated movie theatres? Frequent establishments that have live sex shows and X-rated film loops or topless and/or bottomless bars and clubs?

31. If so, has he ever asked, pressured, or forced you to attend these establishments with him?

32. Did/does he go to massage parlors, use "escort services," or use prostitutes?

## IF THE VICTIM DID NOT KNOW HER ASSAILANT(S)

1. Did your assailant refer to pornography when he assaulted you? For example, did he say anything like, "This is what women ask for in the movie, and she loved it"?

2. Did the assailant show you pornography or use pornography during the assault? If so, what kind?

3. Did the assailant(s) take pictures or films of you during the assault?

4. During the assault were you forced to act out scenes that were from pornography described or displayed by the assailant?

5. Did your assault take place in an area in which there are a lot of pornographic establishments, such as X-rated movie theatres, bookstores, etc.?

6. Was there pornography in the place in which you were assaulted?

## QUESTIONS FOR WOMEN, GIRLS, AND BOYS WHO HAVE BEEN USED IN PORNOGRAPHY

1. Were you a runaway? If so, when did you leave home?

2. Had you been sexually abused before you left home? If so, by whom? How? How old were you when the abuse took place? How old was the person who abused you? Was that person a family member or friend?

3. If you were abused before you left home, was pornography part of the abuse? How was it used?

4. Were you involved in prostitution? Did you have a pimp? Was there an older man who told you what to do, made you have sex for money, and collected the money afterwards?

5. How did you first become involved in pornography? What were the circumstances of your life? How old were you?

6. What kind of pornography were you used in?

7. Were forced into the making of pornography by:

   a. Threats?

   b. Violence?

   c. Poverty?

   d. Trickery?

   e. Pressure by a relative, friend, or lover?

   Explain.

8. Were you shown magazines such as *Playboy*, *Penthouse*, *Hustler*, *Screw*, or others or were you shown films to convince you to pose for pornography?

9. Do you know other people who have been forced or pressured into posing for pornography?

10. Were you ever beaten, whipped, spanked, or physically hurt in the making of pornography? Were you ever tied up? Did you have to act out violent scenes? Was the sex physically painful?

11. Do you know people who were physically hurt in the making of pornography?

12. Do you know who produced or profited from the pornography you were used in? Do you know if they were involved in organized crime?

13. Do you know about or have you heard about people being murdered in the making of pornography?

14. Were you in prostitution while you were being used to make pornography? Were other women, girls, or boys you know in pornography also in prostitution?

15. How has your experience in pornography affected how you feel about yourself? How has it affected your relationships with others? Your schooling and/or job performance?

16. Do you ever have flashbacks or nightmares about your experience in pornography?

17. Do you suffer from phobias?

18. How do you feel now when you see pornography?

19. Have you had upsetting experiences with pornography outside your experiences in the sex industry?

20. What would you like to see done to help women, girls or boys who have been used/abused in pornography?

21. Would you like to be able to take legal action against the people who abused you? Would you like to be able to sue them? Would you like to be able to stop the pornography used against you from being shown?

## QUESTIONS ABOUT SEXUAL HARASSMENT AND PORNOGRAPHY

I. Victims of sexual harassment through pornography in public places

1. Is pornography displayed in public places in your community?

2. If so, where is it and what kinds of materials?

3. How does this material make you feel about yourself? How does it make you feel about your relationships with others?

4. Have any people you know been upset by pornographic materials they've seen?

5. Have you ever been sexually harassed by men in pornography districts, in front of pornography theatres or bookstores, in front of the pornography sections of a newsstand, grocery store, or drugstore?

6. If so, how did this make you feel?

7. Does the pervasiveness of pornography upset you or frighten you?

8. Does pornography make you frightened to perform your daily activities such as traveling to and from your job?

9. Have you ever been sexually harassed by men who referred to pornography or made comments to you that seemed to come from pornography?

II. Victims of sexual harassment involving pornography on the job

1. Is pornography displayed or used at your place of employment?

2. If so, what kind? Where do you see it? Who uses it?

3. Have you ever been sexually harassed on the job? If so, was pornography involved in harassment, i.e., did your boss, co-worker, or customer show you pornography, display pornography, or make verbal references to pornography?

4. Have your co-workers, bosses, or customers ever compared you to models in pornography?

5. How has the presence or use of pornography in your place of work made you feel about yourself and your ability to perform your job?

6. Have you ever complained to anyone about sexual harassment on the job involving pornography? If so, to whom? If not, why not?

7. Were any steps taken about the harassment?

8. Have you ever been forced to leave your job or have you ever considered leaving your job because of sexual harassment involving or related to pornography?

9. Do you think that pornography has contributed to the way your boss, co-workers, employers view you and relate to you?

III. Victims of sexual harassment through pornography in schools and other institutions

1. Is pornography displayed or used in your school?
2. If so, what kind? Were do you see it? Who uses it?
3. Has pornography ever been used in your classroom, i.e., in a course on human sexuality? Have any of your teachers or professors ever used pornographic slides or made references to pornography?
4. Have you ever complained about the presence or use of pornography at your school? If so, to whom? Was any action taken? If not, why not?
5. Have your teachers or fellow students ever used pornography to sexually harass you? Have they ever made verbal references to pornography that have made you feel uncomfortable?
6. Have your ever had pornography imposed on you in social situations at school, such as in fraternity parties or during fraternity or sorority initiations?

IV. Victims of sexual harassment through pornography at home

1. Is there pornography in your home?
2. Do any of your relatives or friends use pornography or make verbal references to it?
3. If so, how does it make you feel?
4. Have you ever attempted to remove the pornography from your home? Were you successful?
5. Do your children see or know about pornography that is kept in your home? If so, has it influenced the way they think about women and sexuality?

# Chapter 5

# Civil Rights

RECOMMENDATION 87:

LEGISLATURES SHOULD CONDUCT HEARINGS AND CONSIDER LEGISLATION RECOGNIZING A CIVIL REMEDY FOR HARM ATTRIBUTABLE TO PORNOGRAPHY.

The Commission heard substantial testimony regarding a civil rights approach as a remedy for harms attributable to pornography.[693] An ordinance encompassing the civil rights approach was originally proposed in Minneapolis, Minnesota, and a similar ordinance was enacted in Indianapolis, Indiana.[694] In 1984, the Indianapolis-Marion County City-County Council found, in essence, that pornography lowers the social standard of treatment of women as a class. The Council found the status of women and the opportunity for equality are undermined by the pornography industry's use of some women to target all women for abuse through making acts of violation into acts of sexual entertainment.695 The harm of pornography is thus conceived to be a form of discrimination on the basis of sex.[696]

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[693] See, Chicago Hearing, Vol. II, Catherine MacKinnon, p. 133; Chicago Hearing, Vol. II, Terese Stanton, p. 168; Houston Hearing, Vol. I, Diana Russell, p. 302; New York Hearing, Vol II, Andrea Dworkin, p. 129; Washington, D.C., Hearing, Vol. I, Dorchen Leidholt, p. 197.

[694] See, Indianapolis-Marion County, Ind., Ordinance 35, ch. 16 (June 15, 1984).

Pornography, in effect, exemplifies inequality in its violation of human rights. It has been defined in the proposed ordinances as sexually explicit pictures or words that subordinate on the basis of sex when those presented are also shown being sexually exploited or brutalized -- for example, women presented as sexual objects enjoying rape, pain or humiliation, being penetrated by objects or animals, in postures of servility, submission or display, or in scenarios of degradation or torture in a context that makes these conditions sexual.[697] Men, children of both sexes, and transsexuals could sue for similar violations under the ordinance.[698]

Victims and trained professionals described the harms associated with and attributable to pornography, as including rape, battery, sexual harassment, sexual abuse of children, and forced prostitution.[699] Women have been coerced into pornographic performances by abduction, threats, drugs, and

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[695] *Id*. at S16-1(a)(2).

[696] *See generally*, MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv.C.R.-C.L. L. Rev. 1(1985).

[697] Indianapolis-Marion County, Ind., Ordinance 35, ch. 16 (June 15, 1984).

[698] *Id*.

[699] *See*, Houston Hearing, Vol. I, Diana Russell, p. 285; Miami Hearing, Vol. II, Garrett, p. 19; Washington, D.C., Hearing, Vol. I, Dorchen Leidholt, Vol. I, p. 205; Washington, D.C., Hearing, Vol. I, Sarah Wynter, p. 183.

constant surveillance. Pornography has been forced on unwilling viewers, typically children or women, in homes, in employment, and in public places. Some assaults have been found to be caused by specific pornographic materials providing instigation as well as instruction and legitimization for the acts. Many experiences of pornography-related humiliation, sexual degradation, enforced servility, and physical and mental abuse were substantiated. On the basis of this evidence, civil claims were created for four specified activities: (1) coercion into pornography, (2) forcing pornography on a person, (3) assault directly caused by specific pornography, and (4) trafficking in pornography (production, sale, exhibition, or distribution).[700] Injunctions and damages would be provided under narrowly specified conditions.[701]

The civil rights approach, although controversial702, is the only legal tool suggested to the Commission which is specifically designed to provide direct relief to the victims of the injuries so exhaustively documented in our hearings throughout the country. Most of the evidence that establishes the fact that pornography subordinates women and undermines their status and opportunities for equality comes from extra-judicial sources, studies and individual accounts.[703]

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[700] See, Indianapolis-Marion County, Ind., Ordinance 35, S16-3(g) (4)-(7)(June 15, 1984).

[701] Id. S16-27.

[702] See, Chicago Hearing, Vol. II, Nan Hunter, p. 101; Chicago Hearing, Vol. II, Burton Joseph, p. 4; Houston Hearing, Vol II, John Money, p. 34; Washington, D.C., Hearing, Vol. II, Barry Lynn, p. 169-70.

The United States Supreme Court has recognized and relied upon social and behavioral science findings in several decisions. In Muller v. Oregon,[704] the Supreme Court upheld the constitutionality of an Oregon law limiting women to a ten hour workday.[705] In support of the law, Louis D. Brandeis filed a brief containing what the Court called "a very copious collection" of "expressions of opinion from other than judicial sources."[706] Brandeis' brief contained evidence about women's reactions to contemporary work conditions gathered from surveys, government statistics, factory reports, and opinions of employers, employees, and physicians.[707] The Court relied on this evidence to sustain the Oregon law providing special protection for women in the workplace.[708] This method of presenting an argument became known as a "Brandeis Brief."[709]

Almost half a century later, the Supreme Court relied on social science evidence in the landmark school desegregation decision of Brown v. Board of Education.[710] In declaring "separate but equal" schools unconstitutional, the Court found that segregated facilities have a detrimental effect on children.[711] The Court agreed that,

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[703] See, MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv.C.R.-C.L. L. Rev. 1(1985).

[704] 208 U.S. 412(1908).

[705] Id. at 416.

[706] Id. at 419, n.1.

[707] Levin & Moise, School Desegregation Litigation in the Seventies and the Use of Social Science Evidence - An Annotated Guide, 39 Law & contemp. Probs. 50, 51 (1975) [hereinafter cited as Levin & Moise, School Desegregation].

[708] 208 U.S. at 419-21.

[709] Levin & Moise, School Desegregation, supra, note 707, at 51.

> segregation with the sanction of law . . . has a tendency to [retard] the educational and mental developments of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[712]

The Court added that "this finding is amply supported by modern authority,"[713] and cited, among others, Kenneth Clark and Gunnar Myrdal.[714] The Court's reliance on this material as a basis for finding discrimination was subject to some criticism.[715] On one later occasion, the Court heard "a great deal of medical and sociological"[716] evidence about alcoholism, but rejected it as going "too far on too little knowledge"[717] and declined to find criminal sanctions against public drunkenness to be cruel and unusual punishment.[718] However, the Court has relied upon extrajudicial proof in cases dealing with issues as diverse as the death penalty[719] and the constitutionality of six member juries.[720] The late Judge J. Braxton Craven of the United States Court of Appeals for the Fourth Circuit noted that "Brandeis briefs" are now standard operating procedure in equal employment, ecology, and school desegregation cases.[721] Judge Craven wrote,

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[710] 347 U.S. 483(1954).

[711] Id. at 494.

[712] Id.

[713] Id.

[714] Id. at 494-95, n. 11.

[715] See, Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150(1955); Fiss, The Jurisprudence of Busing, 39 Law & Contemp. Probs. 194 (1975).

[716] Powell v. Texas, 392 U.S. 514, 537(1968) (Black, J., concurring).

> To give a simplistic answer to a difficult question, the role that the social sciences ought to play in the judicial decision making process is of course the same as the role of any other science whether medical, electronic, or atomic.
>
> In short, all sources of human information and knowledge properly contribute to the determination of the facts.[722]

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[717] *Id*. at 521.

[718] *Id*. at 521-23.

[719] *Furman v. Georgia*, 408 U.S. 238, 250-51 n.15(1972) (Douglas, J., concurring) (citing studies that conclude the death penalty is disproportionately applied in cases involving poor or black defendants); at 307 n.7 (Stewart, J., concurring) (citing studies comparing crime rates in jurisdictions with death penalty provisions).

[720] *Williams v. Florida*, 399 U.S. 78, 101-02 n. 49(1970) (citing psychological evidence that twelve member juries are no more advantageous to criminal defendants than six member panels).

[721] Craven, *The Impact of Social Service Evidence on the Judge - A Personal Comment*, 39 Law & Contemp. Probs. 157, 63 (1975).

[722] *Id*.

Judge Craven concluded with respect to the extra judicial proof in Brown v. Board of Education,

> Although startling at the time, the decision now rests upon a bedrock of public opinion that school assignments and legal distinctions based on race are unfair and that enforced separation of a minority group stigmatizes them.723

James B. McMillan, United States District Judge in the Western District of North Carolina, wrote, "The study of people and their problems is a natural prerequisite of the legal decision of problems among people."[724] It is this very type of evidence that the Commission has found to be persuasive. While the United States Court of Appeals for the Seventh Circuit found the Indianapolis ordinance unconstitutional because of its definition of "pornography,"725 the court accepted the premise of the legislation and said,

> Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of

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[723] Id. at 153.

[724] J.B. McMillan, Social Science and the District Court The Observations of a Journeyman Trial Judge, 39 Law & Contemp. Probs. 157, 163(1975).

[725] American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325(1985).

all kinds]." Indianapolis Code S16-1(a)(2).[726]

The court of appeals recognized that pornography harms women just as the United States Supreme Court found excessive working hours harmful to women in *Muller v. Oregon* and segregated schools harmful to minority students in *Brown v. Board of Education*. As a result of the United States Supreme Court's summary affirmance of the court of appeals in *Hudnut v. American Booksellers Association*,[727] proponents of the civil rights ordinance approach to pornography must attempt to fashion a definition of pornography which will pass constitutional muster.

The Commission recommends that any civil rights approach used to address harms attributable to pornography should include an affirmative defense of a knowing and voluntary consent to the acts. This defense would prevent performers who choose to engage in the production of pornographic materials from seeking recovery.

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[726] *Id.* at 329. In footnote 2, the court added,

> In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions.
>
> See *Gregg v. Georgia*, 428 U.S. 153, 184-87, 96 S.Ct 2909, 2930-31, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, J.).

[727] 54 U.S.L.W. 3548(Feb. 25, 1986).

## CONCLUSION

The pattern of harm documented before the Commission, taken as a whole, supports the conclusion that the pornography industry systematically violates human rights with apparent impunity. The most powerless citizens in society are singled out on the basis of their gender -- often aggravated by their age, race, disability, or other vulnerability -- for deprivations of liberty, property, labor, bodily and psychic security and integrity, privacy, reputation, and even life.

So that pornography can be made, victims have been exploited under conditions providing them a lack of choice and have been coerced to perform sex acts against their will. Public figures and private individuals alike are defamed in pornography with increasing frequency. It is also foreseeable, on the basis of our evidence, that unwilling individuals have been forced to consume pornography, in order to pressure or induce or humiliate or browbeat them into performing the acts depicted. Individuals have also been deprived of equal access to services, employment or education as a result of acts relating to pornography. Acts of physical aggression more and more appear tied to the targeting of women and children for sexual abuse in these materials.[728]

Through these means, the pornographers' abuse of individual members of protected groups both victimizes them and notifies all of society that such abuses of them is permitted. This in turn serves to terrorize others in their group and contributes to a general atmosphere of bigotry and contempt for their rights and human dignity, in an impact reminiscent of the Ku Klux Klan. Respect for law is undermined when such flagrant violations go unchecked -- even more so when they are celebrated as liberties protected by government.

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[728] See, Recommendations for Regulating Child Pornography in Chapter 3 of this Part and the complete discussion of Victimization in Chapter 1 of Part Five.

We therefore conclude that pornography, when it leads to coerced viewing, contributes to an assault, is defamatory, or is actively trafficked, constitutes a practice of discrimination on the basis of sex. Any legal protections which currently exist for such practices are inconsistent with contemporary notions of individual equality.

The Commission accordingly recommends that the legislature should conduct public hearings and consider legislation affording protection to those individuals whose civil rights have been violated by the production or distribution of pornography. The legislation should define pornography realistically and encompass all those materials, and only those materials, which actively deprive citizens of such rights. At a minimum, claims could be provided against trafficking, coercion, forced viewing, defamation, and assault, reaching the industry as necessary to remedy these abuses, consistent with the First and Fourteenth Amendments.

## Chapter 6

## Nuisance

The exhibition of obscene materials constitutes "a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole."[729] Thus the exhibition of obscene materials may be enjoined as a public nuisance under applicable state law or local ordinance.[730]

Nuisance abatement suits have successfully been brought to enjoin the exhibition or dissemination of specific books, magazines, or movies.[731] However, the constitutional provisions against prior restraint of presumptively protected speech is an important limitation on the use of nuisance actions.[732]

Plaintiffs in civil nuisance actions should use procedures which include procedural safeguards against invalid prior restraints.[733] The United States Supreme Court rejected the application of nuisance statutes to enjoin the future exhibition of unnamed films in an "adults only" pornographic theater.[734]

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[729] Evans Theatre Corp. v. Slaton, 180 S.E.2d 712, 715-16(Ga. 1971), cert. denied 404 U.S. 950.

[730] See, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54-55(1973).

[731] See, Trans-Lux Corp. v. State, 366; So. 2d 710(Ala. 1979); Sanders v. State, 203 S.E.2d 153(Ga.); Minor v. Central Ave. News, Inc., 308 N.W.2d 851(N.D. 1981), app. dism. 102 (Okla.); People ex rel. Busch v. Projection Room Theatre, 550 P.2d 600(1976).

[732] See generally, Freedman v. Maryland, 380 U.S. 51(1965); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546(1975).

Courts have also been unwilling to enjoin the future operation of "adults only" pornographic outlets or theatres that have exhibited obscene publications or films in the past because of First Amendment concerns regarding prior restraints.[735] Other courts have upheld injunctions closing the offending establishments for a period of one year.[736]

To avoid First Amendment challenges, nuisance actions may also be brought based upon lewd activity, assignation, or prostitution occurring on the premises where the obscene material is sold or exhibited.[737]

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[733] *See*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 560.

[734] *Vance v. Universal Amusement Co.*, 445 U.S. 308(1980).

[735] *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600(1976); *State v. A Motion Picture Entitled "The Bet"*, 547 P.2d 760(Kan.).

[736] *State ex rel. Cahalan v. Diversified Theatrical Corp.*, 229 N.W.2d 389(Mich. App.); *City of Tallmadge v. Avenue Book Store*, No. 10038(Ohio App. Summit County, Oct. 28, 1981) *cert. denied* 459 U.S. 997(1982).

[737] *People v. Adult World Bookstore*, 108 Cal. App. 3d 404, 166 Cal. Rptr. 519(1980); *People v. Golman*, 7 Ill. App. 3d 253, 287 N.E.2d 177(Ill. 1972).

## Chapter 7

## Anti-Display Laws

Anti-display laws regulate the method by which pornographic materials can be publicly displayed. Statutes or ordinances may be enacted to restrict the display of sexually explicit materials to minors. In order to withstand constitutional challenges, such laws should apply only to materials that are obscene as to minors.[738] The regulations also should contain reasonable time, place, and manner restrictions.[739]

In M.S. News Co. v. Casado,[740] the United States Court of Appeals for the Tenth Circuit upheld a Wichita, Kansas, ordinance which restricted the display of material "harmful to minors."[741] The Wichita ordinance defined "harmful to minors" as any

> description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse when the material or performance, taken as a whole, has the following characteristics:
>
> (a) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; and

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[738] See, Ginsberg v. New York, 390 U.S. 629, 645-47(1968).

[739] See, Young v. American Mini-Theatres, 427 U.S. 50, 63(1976).

[740] 721 F.2d 1281(10th Cir. 1983).

[741] Wichita, Kan., Ordinance no. 36-172, S5.68 156(1985).

> (b) The average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sado-masochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and
>
> (c) The material or performance lacks serious literary, scientific, educational, artistic, or political value for minors.[742]

The ordinance also provided criminal penalties.

> The penalties may be imposed when any person having custody, control or supervision of any commercial establishment shall knowingly:
>
> (a) display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material provided, however, a person shall be deemed not to have "displayed" material harmful to minors if the material is kept behind devices commonly known as "blinder racks" so that the lower two-thirds of the material is not exposed to view.[743]

The court of appeals found that the definition of "harmful to minors" properly tracked the standards enunciated in *Ginsberg v. New York*[744], and *Miller v. California*.[745] The requirement that the lower two-thirds of the material be covered was neither overbroad nor vague.746 While the ordinance did restrict an adult's opportunity to view the materials, it did not prevent an adult from purchasing them.747 The Court found the ordinance to be a reasonable time, place, and manner restriction justified by the government's interest in protecting minors.748

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[742] *Id.*

[743] *Id.*

[744] 390 U.S. 629, 645-47(1968).

[745] 413 U.S. 15, 24(1973).

A Minneapolis, Minnesota, ordinance749 which was more restrictive than the one enacted in Wichita withstood a constitutional challenge in Upper Midwest Booksellers v. City of Minneapolis.750 The Minneapolis Ordinance provided,

> It is unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material which is harmful to minors in its content in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is at all times kept in a sealed wrapper.
>
> (a) It is also unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material whose cover, covers, or packaging, standing alone, is harmful to minors, in any place where minors are able to view such material unless each item of such material is blacked from view by an opaque cover. The requirement of an opaque cover shall be deemed satisfied concerning such material if those portions of the cover, covers, or packaging containing such material harmful to minors are

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746 721 F.2d 1281, 1287(10th Cir.1983).

747 Id. at 1288-89

748 Id.

749 Minneapolis, Minn., Ordinances S385.131(1985).

750 602 F. Supp. 1361(D. Minn. 1985).

blocked from view by an opaque cover.[751]

The Booksellers maintained that the requirement of a sealed wrapper was unduly restrictive as to an adult's right to peruse the materials which were harmful to minors but not to adults.[752] The Court concluded that any inconvenience suffered by adult patrons was not sufficient to render the restrictions unconstitutional.[753] If adults wanted to peruse the materials covered by the ordinance, the Court reasoned that they would be able to do so in one of several ways: 1) ask a clerk to remove the wrapper; 2) view an "inspection copy" kept behind the store counter, or 3) view the material in an "adults only" pornography outlet that excludes minors.[754]

Display laws which define "harmful to minors" with language other than the *Ginsberg* standard have been found unconstitutional.[755]

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[751] Minneapolis, Minn., Ordinances S385.131(6)(a)(1985).

[752] 602 F. Supp. at 1370.

[753] *Id.* at 1372.

[754] *Id.*

[755] *See*, *Hillsboro News Co. v. City of Tampa*, 451 F. Supp. 952(M.D. Fla. 1978) (ordinance restricted display of "offensive sexual material" found unconstitutionally vague); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (statute prohibiting display or sale to minors of material containing nude figures held overbroad because prohibition extends to material not obscene as to minors); *American Booksellers Ass'n, Inc. b. Superior Court*, 129 Cal. App. 3d 197, 181 Ca. Rptr. 33(1982) (ordinance overbroad because it required sealing material containing any photo whose primary purpose is sexual arousal regardless of whether obscene as to minors);

While opaque covers and sealed wrappers are a permissible
ans of restricting the display of sexually explicit materials
minors, a Virginia statute which simply made it unlawful to
splay material harmful to minors in a manner "whereby juveniles
y examine and peruse it" was found unconstitutional.[756] The
ginia statute contained no provisions for the use of opaque
ers and the court found that outlets would face unreasonable
dens in complying with the statute.[757] They would have to
rive adults of the material, remove it from their shelves or
minors from their stores.[758] The Court also found the idea
outlets restructuring their premises and creating an "adults
y" section to be unreasonable.[759] The Court concluded the
ute was overbroad as a time, place and manner restriction.[760]
equirement of opaque covers or "blinder racks" would have
owed the scope of the restriction and could have provided the

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deron v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S.2d
1978) (ordinance overbroad because it prohibited sale and
bition to juveniles of material that was not obscene as to
niles); Oregon v. Frink, 60 Or. App. 209, 653 P.2d 553(1982)
tute prohibiting dissemination of all nudity to minors
broad because it does not limit prohibition to material that
scene as to juveniles).

[756] American Booksellers Ass'n v. Strobel, 617 F. Supp.
E.D. Va. 1985).

[757] Id. at 706.

[758] Id. at 702-03.

[759] Id.

[760] Id. at 706.

basis for the court upholding the statute in this case.[761]

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[761] Id. at 706-07.

# PART FOUR

9

# Chapter 1

# Victimization

Women, men, and children who believe they have been harmed by pornography described adverse physical and psychological effects in their public testimony before the Commission and other bodies and in accounts given in writing or in interviews by Commission staff. The Commission heard testimony from thirty witnesses who reported that they or others with whom they had special relationships had been harmed in some manner by or as a result of pornography. More than one hundred persons were interviewed by Commission staff investigators, who were law enforcement personnel with considerable experience in dealing with trauma victims. Although in many instances, facts related by the person interviewed could be verified by reference to treatment records, court records, or law enforcement files, in other instances no independent verification was possible. In addition to the foregoing, a number of other statements were received in letters from persons who reported pornography-related victimization and in exhibits filed by witnesses from hearings before other fact finders, including city councils, courts of record, and the United States Senate. Some of these individuals reported an extensive series of traumatic events in their lives, making it difficult to assess the relationship, if any, between pornography and their suffering.

Witnesses attributed to pornography their having been coerced into pornographic performances, bound and beaten in direct imitation of pornography, and forcibly imprisoned for the purpose of manufacturing pornography. Although this Commission can neither conclusively determine that pornography caused these physical harms nor conclusively determine that it did not, it was the opinion of the witnesses that pornography played a central role in the pattern of abuse within which they were harmed.

Witnesses attributed many different kinds of damage to psychological functioning and sense of self to their having been used in the production of pornographic materials, exposed to pornographic materials, or sexually assaulted by offenders who used pornography as part of the abuse. Many of these psychological injuries correspond to the signs and symptoms of post-traumatic stress disorder.[762] Witnesses also attributed to pornography financial losses due to hospitalization and therapy, damage to family relationships and status in the community caused by defamatory representations in pornography, associations between prostitution and pornography, and sexual harassment through pornography. Many of the women, men, and children who testified reported each of these types of consequences, and some individuals are quoted repeatedly in various sections of this chapter.

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[762] "The essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of human experience. The characteristic symptoms involve reexperiencing the traumatic event; numbing of responsiveness to, or deduced involvement with, the external world; and a variety of autonomic, dysphoric, or cognitive symptoms." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 236 (3d ed. 1980).

Although we have tried in this chapter to allow victims to speak in their own words, without interpretation or commentary, we have in several instances quoted the words of victims' mothers, friends, or therapists. We have done so only because there are instances in which the victims themselves were unavailable for testimony. In the same vein, we quote here pertinent excerpts from the eloquent testimony of Andrea Dworkin on behalf of many other victims whose voices were not heard:

> My name is Andrea Dworkin. I am a citizen of the United States, and in this country where I live, every year millions of pictures are being made of women with our legs spread. We are called beaver, we are called pussy, our genitals are tied up, they are pasted, makeup is put on them to make them pop out of a page at a male viewer. Millions and millions of pictures are made of us in postures of submission and sexual access so that our vaginas are exposed for penetration, our anuses are exposed for penetration, our throats are used as if they are genitals for penetration. In this country where I live as a citizen real rapes are on film and are being sold in the marketplace. And the major motif of pornography as a form of entertainment is that women are raped and violated and humiliated until we discover that we like it and at that point we ask for more.
>
> In this country where I live as a citizen, women are penetrated by animals and objects for public entertainment, women are urinated on and defecated on, women and girls are used interchangeably so that grown women are made up to look like five- or six-year-old children surrounded by toys, presented in mainstream pornographic publications for anal penetration. There are magazines in which adult women are presented with their pubic areas shaved so that they resemble children.
>
> In this country where I live, there is a trafficking in

pornography that exploits mentally and physically disabled women, women who are maimed; there is amputee pornography, a trade in women who have been maimed in that way, as if that is a sexual fetish for men. In this country where I live, there is a trade in racism as a form of sexual pleasure, so that the plantation is presented as a form of sexual gratification for the black woman slave who asks please to be abused, please to be raped, please to be hurt. Black skin is presented as if it is a female genital, and all the violence and the abuse and the humiliation that is in general directed against female genitals is directed against the black skin of women in pornography.

Asian women in this country where I live are tied from trees and hung from ceilings and hung from doorways as a form of public entertainment. There is a concentration camp pornography in this country where I live, where the concentration camp and the atrocities that occurred there are presented as existing for the sexual pleasure of the victim, of the woman, who orgasms to the real abuses that occurred, not very long ago in history.

In the country where I live as a citizen, there is a pornography of the humiliation of women where every single way of humiliating a human being is taken to be a form of sexual pleasure for the viewer and for the victim; where women are covered in filth, including feces, including mud, including paint, including blood, including semen; where women are tortured for the sexual pleasure of those who watch and those who do the torture, where women are murdered for the sexual pleasure of murdering women, and this material exists because it is fun, because it is entertainment, because it is a form of pleasure, and there are those who say it is a form of freedom.

Certainly it is freedom for those who do it. Certainly it is freedom for those who use it as entertainment, but we are also asked to believe that it is freedom for those to whom it is done.

Then this entertainment is taken, and it is used on other women, women who aren't in the pornography, to force those women into prostitution, to make them imitate the acts in the pornography. The women in the pornography, sixty-five to seventy percent of them we believe are victims of incest or child sexual abuse. They are poor women; they are not women who have opportunities in this society. The are frequently runaways who are picked up by pimps and exploited.

They are frequently raped, the rapes are filmed, they are kept in prostitution by blackmail. The pornography is used on prostitutes by johns who are expected to replicate the sexual acts in the pornography, no matter how damaging it is.

Pornography is used in rape--to plan it, to execute it, to choreograph it, to engender the excitement to commit the act. Pornography is used in gang rape against women. We see an increase since the release of "Deep Throat" in throat rape--where women show up in emergency rooms because men believe they can penetrate, deep-thrust, to the bottom of a woman's throat. We see increasing use of all elements of pornography in battery, which is the most commonly committed violent crime in this country, including the rape of women by animals, including maiming, including heavy bondage, including outright torture.

We have seen in the last eight years, an increase in the use of cameras in rapes. And those rapes are filmed and then they are put on the marketplace and they are protected speech--they are real rapes. We see pornography in the harassment of women on jobs, especially in nontraditional jobs, in the harassment of women in education, to create terror and compliance in the home, which as you know is the most dangerous place for women in this society, where more violence is committed against women than anywhere else. We see pornography used to create harassment of women and children in neighborhoods that are saturated with pornography, where people come from other parts of the city and then prey on the populations of people who live in those neighborhoods, and that increases physical attack and verbal assault.

We see pornography having introduced a profit motive into rape. We see that filmed rapes are protected speech. We see the centrality of pornography in serial murders. There are snuff films. We see boys imitating pornography.

We see the average age of rapists going down. We are beginning to see gang rapes in elementary schools committed by elementary school age boys imitating pornography. We see sexual assault after death where frequently the pornography is the motive for the murder because the man believes that he will get a particular kind of sexual pleasure having sex with a woman after she is dead.

We see a major trade in women, we see the torture of women as a form of entertainment, and we see women also suffering the injury of objectification-- that is to say we are dehumanized. We are treated as if we are subhuman, and that is a precondition for violence against us.

I live in a country where if you film any act of humiliation or torture, and if the victim is a woman, the film is both entertainment and it is protected speech. Now that tells me something about what it means to be a woman citizen in this country, and the meaning of being second class.

When your rape is entertainment, your worthlessness is absolute. You have reached the nadir of social worthlessness. The civil impact of pornography on women is staggering. It keeps us socially silent, it keeps us socially compliant, it keeps us afraid in neighborhoods; and it creates a vast hopelessness for women, a vast despair. One lives inside a nightmare of sexual abuse that is both actual and potential, and you have the great joy of knowing that your nightmare is someone else's freedom and someone else's fun.

. . . The first thing I am going to ask you to do is listen to women who want to talk to you about what has happened to them. Please listen to them. They know, they know how this works . . . . [I]t has happened to them.

I am also asking you to acknowledge the international reality of this--this is a human rights issue--for a very personal reason, which is that my grandparents came here, Jews fleeing from Russia, Jews fleeing from Hungary. Those who did not come to this country were all killed, either in pogroms or by the Nazis. They came here for me. I live here, and I live in a country where women are tortured as a form of public entertainment and for profit, and that torture is upheld as a state-protected right. Now, that is unbearable.

I am asking you to help the exploited, not the exploiters. You have a tremendous opportunity here. I am asking you as individuals to have the courage, because I think it's what you will need, to actually be willing yourselves to go and cut that woman down and untie her hands and take the gag out of her mouth, and to do something, for her freedom.[763]

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[763] New York Hearing, Vol. II, Andrea Dworkin, p. 129-51.

## II. ADVERSE EFFECTS

### A. Physical Harm

#### 1. Rape

The Commission received testimony alleging rapes related to pornography. For example, a woman reported that her daughter was forced to engage in sexual acts in the making of pornographic materials.

> My daughter attended [a] Pre-school in . . . California. She was three years old when she began attending. During the six months she attended before the school closed, she was sexually molested on multiple occasions, by teachers on the school grounds and also was taken off school property to unknown locations to be molested by persons unknown to me. Photographs were taken on many (if not all) of these occasions. She was threatened with physical violence with a knife and a gun and was forced to watch animals being killed.[764]

A man who claimed he had participated in over one hundred pornographic films in two and a half years testified:

> I have seen it totally destroy too many lives, but mostly the girls. It's a lot harder on young ladies. I have seen a lot of producers and directors and photographers, just to get out a product that they have in mind, either badger or almost force the girls into doing things that they would really rather not do. I, myself, have been on a couple of sets where the young ladies have been forced to do even anal sex scenes with a guy which is rather large and I have seen them crying in pain and just totally destroys their personality

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[764] Miami Hearings, Vol. II, p. 285B.

when they are forced to do things like that.[765]

Other rapes were allegedly stimulated by the viewing of pornography or modeled after particular pornographic materials.

A mother left her ten year old daughter for two hours with a very close friend who lived next door. The friend had the girl watch pornographic movies on the Playboy TV channel and then engaged in oral sex with her.[766]

In testimony before another body, one woman reported:

> Over a period of eighteen years the woman was regularly raped by this man. He would bring pornographic magazines, books, and paraphernalia into the bedroom with him and tell her that if she did not perform the sexual acts that were being done in the "dirty" books and magazines he would beat and kill her. I know about this because my bedroom was right next to hers. I could hear everything they said. I could hear her screams and cries. In addition, since I did most of the cleaning in the house, I would often come across the books, magazines, and paraphernalia that were in the bedroom and other rooms of the house. The magazines had pictures of mostly women and children and some men. Eventually, the woman admitted to me that her ex-husband did in fact use pornographic materials to terrorize and rape her.[767]

Another woman wrote:

> When I first met my husband, it was in early 1975, and he was all the time talking about Ms. Marchiano's film, Deep Throat. After we were married, he on several occasions referred to her performances and suggested I

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[765] Los Angeles Hearing, Vol. I, p. 81.

[766] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

[767] Minneapolis City Council, Session II, p. 14 (Dec. 1983).

> try to imitate her actions . . . . Last January . . . my husband raped me . . . . He made me strip and lie on our bed. He cut our clothesline up . . . and tied my hands and feet to the four corners of the bedframe. (All this was done while our nine month old son watched.) While he held a butcher knife on me threatening to kill me he fed me three strong tranquilizers. I started crying and because the baby got scared and also began crying, he beat my face and my body. I later had welts and bruises. He attempted to smother me with a pillow . . . . Then, he had sex with me vaginally, and then forced me to give oral sex to him.[768]

Another woman alleged that her father had used Playboy in connection with his molestation of her when she was a small child:

> . . . This father took a Playboy magazine and wrote her name across the centerfold. Then he placed it under the covers so she would find it when she went to bed. He joined her in bed that night and taught her about sex.

According to another source:

> A five year old child told her foster mother, "We have movies at home. Daddy shows them when mother is gone. The people do not wear clothes, and Daddy and I take our clothes off and do the same thing the people in the movies do.[769]

Women who had been asked if they had ever been upset by anyone trying to get them to do what they'd seen in pornographic pictures, movies or books had described the following examples:

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[768] Anonymous letter to the Pornography Resource Center forwarded to the Attorney General's Commission on Pornography.

[769] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

> Miss D: I was staying at this guy's house. He tried to make me have oral sex with him. He said he'd seen far-out stuff in movies, and that it would be fun to mentally and physically torture a woman.
>
> Miss G: He forced me to have oral sex with him when I had no desire to do it.
>
> Miss M: Anal sex. First he attempted gentle persuasion, I guess. He was somebody I'd been dating a while and we'd gone to bed a few times. Once he tried to persuade [me] to go along with anal sex, first verbally, then by touching me. When I said, "no," he did it anyway--much to my pain. It hurt like hell.[770]

One rape victim said that her assailants had attacked her after perusing pornographic magazines:

> The third man forced his penis into my mouth and told me to do it and I didn't know how to do it, I did not know what I was supposed to be doing. He started swearing at me and calling me a bitch and a slut and that I better do it right and that I wasn't even trying. Then he started getting very angry and one of men pulled the trigger in his gun so I tried harder.
>
> Then when he had an erection, he raped me. They continued to make jokes about how lucky they were to have found me when they did and they made jokes about being a virgin. They started kicking leaves and pine needles on me and kicking me and told me that if I wanted more, that I could come back the next day.
>
> Then they started walking away and I put my clothes back on and it was not far from where they had set up their camp and I looked down and saw that they had been reading pornographic magazines. They were magazines with nude women on the covers.[771]

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[770] Minneapolis City Council, Session I. p. 65, 67 (Dec. 1983). (Testimony based on Diana Russell's research).

[771] Minneapolis City Council, Session II, p. 42 (Dec. 1983).

Elsewhere a gang rape was attributed to imitation of a specific piece of pornography:

> [A] a gang rape of a juvenile girl [was committed] by six adolescent boys who used a pornographic magazine's pictorial and editorial outlay to recreate a rape in the woods outside of their housing development.[772]

Another victim of sexual assault during childhood attributed her assailant's behavior to the instruction of pornography:

> What this game consisted of was each child going into a tool shed with this guy. When my turn came I didn't want to go in because I was scared, it was dark in there and it was dirty. There were cobwebs and there was this giant pitchfork.
>
> One of the kids pushed me inside and shut the door. Then this boy grabbed me and he pulled down my shorts and sexually abused me. In short, he finger-fucked me and he made me masturbate him. I was really terrified. I thought I was in hell, and I was also in a lot of pain. I started crying really hard and he finally let me go, but I was told that if I told anyone I wouldn't be believed, that it was all my fault and that I would be punished. He also told me that he would hurt me again if I told anyone. His sister told me that this game he had learned from his dirty books. I knew that he had these dirty books because I had seen him with them.[773]

nother witness testified that pornography had been used by a man ho had sexually abused her in childhood:

> A lot of raping went on in the basement. That is also where the pornography books were. They were magazines that were brought of hiding, out of boxes that were on the top of shelves.

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[772] Pornography Speech presented to the National Women udges Conference, October 12, 1986, submitted to the Attorney eneral's Commission on Pornography.

[773] Minneapolis City Council, Session II, p. 48-49 (Dec. 983).

READEX FICHE

> When [he] and I got to the top of the stairs I knew I was going to pay for my little arrangement. He ordered me to take my clothing off and he tried to rape me. He was too big and I was too small. He forced me to go down on him . . . .[774]

Other witnesses testified that men had required of them particular acts that had been seen in pornography:

> While imitating the women in the magazines was one result of the material, I have always felt that another consequence was the initiation of oral sex into the abuse. This did not occur until after the pornographic material arrived and I firmly believe that the idea came from the pornographic magazines.
>
> Pornography did not cause the incestuous relationship with my older brother but I have always felt that its use contributed to the different types of abuse that was used.[775]

Another woman described the same phenomenon within her marriage:

> I had not realized the extent of the harm that pornography had done to me until a year and a half ago when I was working on a photo montage of the kinds of pornography for an educational forum. I came across a picture of a position that my ex-husband had insisted we try. When we did, I found the position painful, yet he was determined that we have intercourse that way. I hemorrhaged for three days. I finally went to my doctor and I recall the shame I felt as I explained to him what had caused the bleeding.
>
> Once we saw an X-rated film that showed anal intercourse. After that he insisted that I try anal intercourse. I agreed to do so, trying to be the available, willing creature that I thought I was supposed to be. I found the experience very painful, and I told him so. But he kept insisting that we try it again and again.[776]

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[774] Washington, D.C., Hearing, Vol. I, p. 222.

[775] Chicago Hearing, Vol. II, p. 291B.

[776] Chicago Hearing, Vol. II, p. 241F3.

According to a former Playboy bunny:

> A Playmate of the Year, also on the Woman to Woman Show, testified that a man attempted to rape her after he recognized her from the magazine.
>
> I experienced everything from date rape to physical abuse, to group sex and finally to fantasizing homosexuality as I read Playboy magazines. The group sex held in Hefner's mansion was accompanied by the pornographic movie, The Devil in Miss Jones . . . .[777]

A woman who said that both of her husbands had subjected her to sexual and other physical abuse testified,

> Often he would be high on drugs or alcohol and force me to do violent sexual acts while he was leafing through the pictures.[778]

Testifying before another body, one woman described forced sexual activity during the screening of pornographic films:

> . . . comments like "That's how real men do it," instructing the handicapped men, teasing them that if they watched enough of these movies they would be able to perform normally. There were constant remarks made about what normal male sexual experience was. Then the disabled men were undressed by the able men and the woman was forced to engage sexually with the disabled men, there were two weapons in the room. The woman refused and she was forced, held down by the physically able men. Everyone watched and the movies kept going.
>
> After this, the able-bodied men said they were going to show the handicapped men how "real men" do it. They forced the woman to enact simultaneously with the movie. In the movie at this point a group of men were urinating on a naked woman. All the men in the room were able to perform this task, so they all started urinating on the woman who was now naked. Then the able-bodied men had sex with the woman while the

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[777] Chicago Hearing, Vol. I, p. 314, 316.

[778] Washington, D.C., Hearing, Vol. I, p. 125.

disabled men watched.[779]

## 2. Forced Sexual Performance

During the course of the hearings the Commission received reports from individuals who described situations in which they were forced to engage in certain sexual acts. These acts are distinct from and in addition to those acts described as rape above. As with the acts of rape which were described to the Commission, acts of forced sexual performance included those done in the course of making pornographic material and those relating to the use of existing pornography. Examples of the first of these are abundant:

> A mother and father in South Oklahoma City forced their four daughters, ages ten to seventeen, to engage in family sex while pornographic pictures were being filmed. This mother also drove the girls to dates with men where she would watch while the girls had sex, then she would collect fees of thirty to fifty dollars.[780]

A woman who had been forced into prostitution and participating in the filming of pornography testified:

> He had video equipment in his home long before it was mass produced. Every time my pimp sent me to him he would take pornographic pictures of me and a second woman. He also made video tapes of the sex that took place under his direction. This continued on the average of once a week for about a year.

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[779] Minneapolis City Council, Session II, p. 72 (Dec. 1983).

[780] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

> There was an apartment that I was sent to often. There were usually two to three men there. After I had sex with them, they would take pictures of me in various pornographic poses. When I was a young girl I didn't have the vocabulary to call them pornographers. I used to refer to them as "the photographers."
>
> On another occasion another young girl and myself were taken to an apartment in to meet some men. We were told that they were gangsters and that we should be nice to them. When we arrived we were taken into a room that had a large bed at its center surrounded by lighting and film equipment. We were told to act out a "lesbian scene." After about fifteen minutes we were told to get dressed, that they couldn't use us. We were returned to [our city] unpaid. Again, it was only in retrospect as an adult that I realized I had been used in a commercial pornographic film loop.781

Another woman wrote:

> My father was my pimp in pornography. There were three occasions, from ages nine to sixteen, when he forced me to be a pornography model. This was in the 1950s and 1960s . . . . I don't know if the pictures and films are still being distributed.782

A sixteen-year-old girl who had been molested by two family friends from age seven to age twelve testified:

> Viewing the pictures in the magazines seemed to click something for him, for he then wanted his own personal record of all that he had taught me.
>
> He whipped out his Polaroid camera, which was in his briefcase, and then he proceeded to take pictures of me in these various positions, which included using the vibrator.[783]

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[781] Washington, D.C., Hearing, Vol. I, p. 180.

[782] Brief of Women Against Pornography submitted to the ttorney General's Commission on Pornography.

[783] Miami Hearing, Vol II, p. 20-21.

Another woman described her discomfort in trying to pose as demanded of her:

> So I told him that I would try. The first few attempts I failed, he was very disappointed. I failed under the weight and under the heat of the plaster. He wanted me to be in poses where I had to hold my hands up over my head and they would be numb and they would fall. He eventually tied my hands over my head. Finally he succeeded, he ended up getting a plastic cast of my body.
>
> . . . He told me to take off my clothes and to pose in various positions, either draped over the corroded, rusty seats or in positions where I acted as if I was running towards the door. And then he asked me to put my body in contorted different positions, draped down the stairs of the bus, and they were quite jagged, and at that moment I realized that we were depicting a murder. I became very terrified and scared and I was really cold. I told him I didn't want to do this and that I wanted to go home and that I was really scared.
>
> While we were doing this, I would like to backtrack for a minute, I wasn't achieving the right facial expressions for the pictures so he started telling me stories that depicted pursuits during rape so that I would have the right expressions on my face like the women in the magazines. I remember being very distant from him and just wanting to get home. I remember being very scared.[784]

In these instances in which forced sexual performances were said to be modeled after pornography, the individuals stated that they were shown various pornographic materials and forced to recreate the activities depicted. In some cases the imitation required of victims was highly specific, as in the following example:

> My father had an easel that he put by the bed. He'd pin a picture on the easel and like a teacher he would tell me this is what you're going to learn today. He

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[784] Minneapolis, Session II, p. 59-60 (Dec. 1983).

> would then act out the picture on me.[785]

Another woman wrote:

> I was sexually abused by my foster father from the time I was seven until I was thirteen. He had stacks and stacks of *Playboys*. He would take me to his bedroom or his workshop, show me the pictures, and say, "This is what big girls do. If you want to be a big girl, you have to do this, but you can never tell anybody." Then I would have to pose like the women in the pictures. I also remember being shown a *Playboy* cartoon of a man having sex with a child.[786]

A mother described her discovery of her daughter's abuse:

> My daughter explained that the adults would come into the room and announce that [it] was time for a "movie" or a "bath" and then begin to usher the children . . . into the den or the bathroom. When my daughter refused to undress one of the mothers removed my daughter's clothing with hand movement over her entire body. My daughter was seldom allowed to go home until she had at least one bath with one or more children. Upon hearing this I called the mother and gave her emphatic instructions that my daughter was not to take "baths" at her house. One such occasion after that my daughter came home with obvious dried tears on her face. I feared something dreadful had happened.[787]
>
> They confirmed my fear and discovered even more horror. She had been not only sexually abused but over one thousand pornographic photographs were seized in a search of their apartment spanning a period of over two years. My daughter was only twelve years old at the time of the phone call. She had broken up over the events of the previous week.[788]

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[785] Chicago Hearing, Vol. II, p. 95.

[786] Anonymous letter to Women Against Pornography, submitted to the Attorney General's Commission on Pornography (Aug. 1984).

[787] Houston Hearing, Vol. II, p. 178D3.

[788] Houston Hearing, Vol. II, Anonymous, p. 178Q2.

One woman who was asked if she had ever been upset by anyone trying to get her to do what they'd seen in pornographic pictures, movies or books said:

> This guy had seen a movie where a woman was being made love to by dogs. He suggested that some of his friends had a dog and we should have a party and set the dog loose on the women. He wanted me to put a muzzle on the dog and put some sort of stuff on my vagina so that the dog would lick there.[789]

A woman who had been forced into prostitution and participation in the production of pornography testified:

> They knew a child's face when they looked into it. It was clear that I was not acting of my own free will. I was always covered with welts and bruises. They found this very distasteful and admonished me about it. It was even clearer that I was sexually inexperienced. I literally didn't know what to do. So they showed me pornography to teach me about sex and then they would ignore my tears as they positioned my body like the women in the pictures and used me.
>
> My pimp also made me work "stag" parties. These parties were attended by an average of ten to twenty men. These parties took place in catering halls, bars and union halls. I was also forced to work conventions. These were weekend affairs held at major hotels in New York attended by hundreds of professional men. The series of events was the same. Pornographic films followed by myself and other women having sex with the men. The films that were shown most often set the tone for the kinds of acts we were expected to perform.
>
> My last pimp was a pornographer and the most brutal of all. He owned, on the average, three women and girls at any given time. There was always pornography in our apartment. Every night he would set up the projector and run a series of stag films. When he was sufficiently aroused he would choose one of us for sex. The sex that happened always duplicated the pornography. He used it to teach us how to service

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[789] Minneapolis City Council, Session I, p. 67 (Dec. 1983) (Testimony based on Diana Russell's research).

> him. In retrospect the only sex I knew until I was well into my twenties was coercive sex taught to me through pictures of women coerced into pornographic performances.[790]

A sixteen-year-old girl testified:

> At about age eleven and a half he started using the magazine again. In these magazines there were pictures of one woman masturbating another woman, two men and a woman having sex, oral, anal and vaginal sex. It was with these magazines that we started having me act out positions with him.791

The mother of two girls testified:

> [My daughters] also had an experience with an eleven year old boy neighbor boy . . . . Porno pictures that [he] had were shown to the girls and to the other children on the block. Later that day, [he] invited [my daughters] into his house to play video games, but then tried to imitate the sex acts in the photos with [my] eleven year old [daughter] as his partner; [my other daughter] witnessed the incident.[792]

A woman testified that her husband demanded that she enact behaviors he had found appealing in pornography:

> . . . I was coerced into acting out certain sexual fantasies which he had, many times from reading pornographic literature or viewing certain pornographic movies.[793]

Another woman described her father's use of pornography to encourage and legitimize incest:

> He encouraged me by showing me pornographic magazines

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[790] Washington, D.C., Hearing, Vol. I, p. 179-82.

[791] Miami Hearing, Vol. II, p. 21.

[792] Washington, D.C., Hearing, Vol. I, p. 128.

[793] Chicago Hearing, Vol. I, p. 23-26.

> which they kept in the bathroom and told me it was not wrong because they were doing it in the magazines and that made it o.k. He told me all fathers do it to their daughters and said even pastors do it to their daughters. The magazines were to help me learn more about sex.[794]

Another woman described the same phenomenon:

> The incest started at the age of eight. I did not understand any of it and did not feel that it was right. My dad would try to convince me that it was ok. He would find magazines with articles and/or pictures that would show fathers and daughters and/or mothers, brothers and sisters having sexual intercourse. (Mostly fathers and daughters.) He would say that if it was published in magazines that it had to be all right because magazines could not publish lies.
>
> He would show me these magazines and tell me to look at them or read them and I would turn my head and say no. He would leave them with me and tell me to look later. I was afraid not to look or read them because I did not know what he would do. He would ask me later if I had read them and what they said or if I looked real close at the pictures. He would say, "See it's okay to do because it's published in magazines."[795]

### 3. Battery, Torture

Witnesses who appeared before the Commission and those who submitted statements reported acts of battery and episodes of torture associated with the production or use of pornography. Individuals described acts of battery or torture inflicted upon them during the course of producing pornographic materials. For example, a woman who reported having been sexually abused since infancy said:

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[794] Anonymous letter to the Attorney General's Commission on Pornography.

[795] Letter to the Attorney General's Commission on Pornography.

> That night that I was filmed for a pornographic movie, my stepfather tortured me both physically and sexually because I did not perform adequately enough to be convincing.[796]

A young man who had been the victim of a "sex ring" testified:

> I became involved in bondage. I was shown pornography and was bound in various ways and photographed.[797]

Linda Marchiano testified:

> When I decided to head back north and informed Mr. Traynor of my intention, that was when I met the real Mr. Traynor and my two and a half years of imprisonment began. He began a complete turnaround and beat me up physically and began the mental abuse, from that day forward my hell began.
>
> During the filming of *Deep Throat*, actually after the first day, I suffered a brutal beating in my room for smiling on the set. It was a hotel room and the whole crew was in one room, there was at least twenty people partying, music going, laughing, and having a good time. Mr Traynor started to bounce me off the walls. I figured out of twenty people, there might be one human being that would do something to help me and I was screaming for help, I was being beaten, I was being kicked around and again bounced off of walls. And all of a sudden the room next door became very quiet. Nobody, not one person, came to help me.[798]

One witness before the Commission described how women and oung girls were tortured and suffered permanent physical njuries to answer publisher demands for photographs depicting sado-masochistic abuse. When the torturer/photographer inquired of the publisher as to the types of depictions that would sell, the torturer/photographer was instructed to get similar existing publications and use the depictions therein for instruction. The torturer/photographer followed the publisher's instructions, tortured women and girls accordingly, and then sold the photographs to the publisher. The photographs were included in magazines sold nationally in pornographic outlets.[799]

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[796] Washington, D.C., Hearing, Vol II, p. 262.

[797] Washington, D.C., Vol II, p. 49.

[798] Public Hearings before Minneapolis City Council, ession I, p. 47, 49 (Dec. 1983)

The Commission also had received several accounts from individuals who described the use of pornography in the course of physical abuse, and who attributed the type and forms of abuse to specific pornographic materials. For example, one woman who reported having been sexually abused by her father from the age of three testified that he would:

> . . . hang me upside down in a closet and push objects like screwdrivers or table knives inside me. Sometimes he would heat them first. All the while he would have me perform oral sex on him. He would look at his porno pictures almost every day, using them to get ideas of what to do to me or my siblings.[800]

Testifying before another body, another woman said:

> He would read from the pornography like a textbook, like a journal. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots and how to bind me in a way that I couldn't get out.[801]

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[799] Los Angeles Hearing, Vol. II, p. 65, 77. One such publication was purchased in Washington, D.C.

[800] Chicago Hearing, Vol. II, p. 95.

[801] Minneapolis City Council Hearings Session II, p. 68 (Dec. 1983).

A former prostitute testified before another body:

> The man returned with two other men. They burned her with cigarettes and attached nipple clips to her breasts. They had many S and M magazines with them and showed her many pictures of women appearing to consent, enjoy, and encourage this abuse. She was held for twelve hours, continuously raped and beaten. She was paid fifty dollars, or about $2.33 per hour.[802]

Another woman wrote:

> . . . [s]olid charges . . . could be brought forth. Amongst these charges would be sexual deviance due to repeated inflictions of sadomasochistic acts. I was also told I would be entitled to an annulment as the marriage remained unconsummated throughout.
>
> . . . While doing household chores, I found very pornographic materials which illustrated sadist techniques and answered my questions as to where my husband got these bizarre ideas.[803]

former prostitute testified:

> He stripped me, tied me up, spread-eagled on the bed so that I could not move and then began to caress me very gently. Then, when he thought that I was relaxed, he squeezed my nipple really hard. I did not react. He held up a porn magazine with a picture of a beaten woman and said, "I want you to look like that. I want you to hurt." He then began beating me, and when I didn't cry fast enough, he lit a cigarette and held it right above my breast for a long time before he burned me.[804]

other woman testified before another body:

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[802] Public Hearings before Minneapolis City Council, ssion II, p. 73 (Dec. 1983).

[803] Letter to the Attorney General's Commission on rnography.

[804] Public Hearings before Minneapolis City Council, ssion II, p. 77 (Dec. 1983).

> During the time that I was held captive by that man, I was physically and psychologically abused by him. I was whipped with belts and electrical cords. I was beat with pieces of wood. I was usually forced to pull my pants down before I was to be beaten. I was touched and grabbed where I did not want him to touch me. I was also locked into dark closets and the basement for many hours at a time and I was often not allowed to speak or cry.
>
> The things that this man did to me were also done to the children of the woman, except that they suffered from even worse abuse. I believe that part of the psychological abuse I suffered from was from the pornographic materials that the man used in his terrorization of us. I knew that if he wanted to, he could do more of the things that were being done in those magazines to me. When he looked at the magazines, he could make hateful obscene, violent remarks about women in general and about me. I was told that because I am female I am here to be used and abused by him and that because he is male he is the master and I am his slave.[805]

A women's shelter wrote to the Commission:

> One woman known to us related that her spouse always had a number of pornographic magazines around the house. The final episode that resulted in ending their marriage was his acting out a scene from one of the magazines. She was forcibly stripped, bound and gagged. And with help from her husband, she was raped by a German shepherd. His second wife became known to us when she sought out support because of the magazines and bondage equipment she discovered in their home.
>
> Penthouse and Hustler were always a part of the literature in the third woman's home. Occasionally, her spouse would add Cheri, Oui, Swedish Erotica to the collection. His favorite form of abuse was bondage. He enjoyed playing what he called a "game" of whipping and slavery. She knows that what he did to her was directly related to articles about bondage and sex [slaves] which he read. He wanted to involve a second

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[805] Public Hearings before Minneapolis City Council, Session II, p. 15-16 (Dec. 1983).

> woman, her friend, in the scenarios.[806]

A mother of two girls testified:

> [My husband] had a large collection of bizarre S&M and bondage pornography that he kept in the nightstand drawer in our bedroom. On one occasion [he] tied me to our bed and sodomized me. This occurred after I refused to agree to be bound and tied as the models appeared in some of [his] pornographic magazines.
>
> Also, the girls told me that [he] sometimes played a game with them in which their feet were tied up tightly with a rope. The molestation included "bad touching" and exhibitionism by [him], but did not involve actual penetration.[807]

In testifying before another body, one man said

> I understand pornography to be a force in creating violence in the gay community. I was battered by my ex-lover who used pornography. The pornography, straight and gay, I had been exposed to, helped convince me that I had to accept his violence, and helped keep me in that destructive relationship.
>
> Then one time, he branded me. I still have a scar on my butt. He put a little wax initial thing on a hot plate and then stuck it on my ass when I was unaware.[808]

Women who were asked in a research project if they had ever been upset by anyone trying to get them to do what they'd seen in pornographic pictures, movies or books described experiences similar to those reported by Commission witnesses:

Miss F: He'd read something in a pornographic book, and

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[806] Letter from Donna Dunn's Women's Shelter, Rochester, to the Attorney General's Commission on Pornography.

[807] Washington, D.C., Hearing, Vol. I, p. 126-27.

[808] Public Hearings before Minneapolis City Council, Session II, p. 57, (Dec. 1983).

> then he wanted to live it out. It was too violent for me to do something like that. It was basically getting dressed up and spanking. Him spanking me. I refused to do it.
>
> Miss I: It was S&M stuff. I was asked if I would participate in being beaten up. It was a proposition, it never happened. I didn't like the idea of it.
>
> Miss P: My boyfriend and I saw a movie in which there was masochism. After that he wanted to gag me and tie me up. He was stoned, I was not. I was really shocked at his behavior. I was nervous and uptight. He literally tried to force me, after gagging me first. He snuck up behind me with a scarf. He was hurting me with it and I started getting upset. Then I realized it wasn't a joke. He grabbed me and shook me by my shoulders and brought out some ropes, and told me to relax, and that I would enjoy it. Then he started putting me down about my feelings about sex, and my inhibitedness. I started crying and struggling with him, got loose, and kicked him in the testicles, which forced him down on the couch. I ran out of the house. Next day he called and apologized, but that was the end of him.[809]

A woman whose father had sexually abused her from age three testified:

> I have had my hands ties, my feet ties, my mouth taped to teach me big girls don't cry. He would tell me I was very fortunate to have a father that would teach me the facts of life. Many of the pictures he had were of women in bondage, with their hands ties, feet tied and their mouth taped.[810]

In testimony before another body, a woman said:

> I was hit and punched because I refused to allow my partner to put his fist in my vagina in the same fashion as in one of his pornography magazines.[811]

Another woman, testifying before the Commission, reported:

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[809] Public Hearings before Minneapolis City Council, Session I, p. 65, 66 (Dec. 1983) (Testimony based on Diana Russell's research).

[810] Chicago Hearing, Vol. II, p. 95-96.

[811] Testimony before Minneapolis City Council on June 7, 1984, submitted to the Attorney General's Commission on Pornography.

> . . . a trick first showed me how to do bondage and discipline acts. I had numerous customers who would have pornographic material with them. I was asked to shave my pubic hairs because it reminded them of a child or engage in specific sex acts they had seen in a magazine. Having me urinate on them, commonly referred to as golden showers, was a popular request.
>
> Again my customers, who mostly professional types, would bring many examples in magazines or books of the types of bondage they wanted or of other acts they thought would satisfy their sexual desires, like me acting like their mother, enemas, spanking or cross dressing (men dressing in women's undergarments or clothing). I would also get couples (a man & woman) who were into bondage and discipline, with me as the instructor & ultra dominatrix. My customers would want me to dress like women in the magazines or to bind them in some specific way. Urinating on my customer was also not uncommon.812

### 4. Murder

In addition to the physical harms already mentioned, some evidence was received alleging a connection between murder and pornographic materials. Cases were reported to the Commission in which a murder may have been patterned after a depiction found in a pornographic magazine or film. For example, the New York Times reported:

> The December 1984 issue of Penthouse carried this eroticized torture into the 'men's entertainment' forum with a series of photographs of Asian women bound with heavy rope, hung from trees, and sectioned into parts. It is now known whether this pictorial incited a crime that occurred two months later wherein an eight year old Chinese girl living in Chapel Hill, North Carolina, was kidnapped, raped, murdered and left hanging from

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[812] Washington, D.C., Hearing, Vol. II, p. 312A-1.

a tree limb.[813]

Witnesses also described the influence they perceived pornography had in their criminal activities or the crimes others had committed.

> The day came when I invited a small neighborhood boy into my apartment, molested him and then killed him in fear of being caught. Over the next few years I kidnapped, sexually abused and murdered four other boys.
>
> Pornography wasn't the only negative influence in my life, but its effect on me was devastating. I lost all sense of decency and respect for humanity and life.[814]

### 5. Imprisonment

The Commission received testimony and other evidence from individuals who reported that they had been kidnapped or held captive during the production of pornographic materials. For example, the woman who appeared in Deep Throat testified:

> My name today is Linda Marchiano. Linda Lovelace was the name I bore during a two and a half year period of imprisonment. For those of you who don't know the name, Linda Lovelace was the victim of this so-called victimless crime. Used and abused by Mr. Traynor, her captor, she was forced through physical, mental, and sexual abuse and often at gunpoint and threats of her life to be involved with pornography.
>
> I literally became a prisoner. I was not allowed out of his sight, not even to use the bathroom. Why, you

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[813] N.Y. Times, Feb. 4, 1985.

[814] Anonymous letter to the Attorney General's Commission on Pornography.

> may ask, because there was a window in the bathroom.815
>
> Well, at night what he would do is put his body over my body so that if I did try to get up he would wake up. And he was a very light sleeper. If I did attempt to move or roll over in my sleep he would awaken.816

A women's shelter wrote:

> In another case, a woman was imprisoned in the house by her husband. He had a video cassette recorder. He would bring home pornographic movies, tie her to a chair and force her to act out what they were seeing on the screen.[817] She was severely injured and came to our Shelter.[817]

### 6. Sexually Transmitted Diseases

Witnesses reported various injuries and diseases associated with the production of pornography.[818] The diseases which were reported included a variety of sexually transmitted diseases. For example, a citizen's group wrote to the Commission:

> How does a three and a half year old girl learn to cope with gonorrhea of the throat and a painful vagina, stretched many times its normal size because her father used her for sexual gratification. This father was

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[815] Public Hearings before Minneapolis City Council, Session II, p. 45, 46, 47 (Dec. 1983).

[816] Public Hearings before Minneapolis City Council, Session I, p. 56 (Dec. 1983).

[817] Letter from Harriet Tubman Women's Shetler to the Attorney General's Commission on Pornography.

[818] See, Chapter 2 in this Part for a further discussion of the injuries and diseases performers in the pornography industry encounter.

> another pornography addict.[819]

A former Playboy bunny testified:

> I heard a bunny I knew had her reproductive organs removed due to venereal disease left untreated.[820]

A man who had participated in the production of more than one hundred pornographic films testified:

> I decided to get out of the business because I was kind of scared about all the different diseases and stuff going on. I myself was pretty lucky to only have got gonorrhea a couple of times. I never caught herpes or nothing like that. But it is scary. The diseases are really rampant out there, and especially with the AIDS scare. You have one person that has AIDS in the industry and within six months you can really infect about half the industry because there's so much contact; you have so many different jobs, different people, each month.[821]

A woman testified:

> There seemed to be a lot of venereal diseases and other contact diseases going around and I was afraid of catching something.[822]

### 7. Masochistic Self Harm

One person described her son's use of pornography and his resulting death.823

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[819] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

[820] Chicago Hearing, Vol. I, p. 317.

[821] Los Angeles Hearing, Vol. I, p. 82.

[822] Washington, D.C., Hearing, Vol. I, p. 82.

> My son, Troy Daniel Dunaway, was murdered on August 6, 1981, by the greed and avarice of the publishers of Hustler Magazine. My son read the article 'Orgasm of Death', set up the sexual experiment depicted therein, followed the explicit instructions of the article, and ended up dead. He would still be alive today were he not enticed and incited into this action by Hustler Magazine's 'How To Do' August 1981 article; an article which was found at his feet and which directly caused his death.[824]

A woman testified about her husband, who was a medical professional and an avid consumer of pornography:

> . . . extremely excited about was the story of a man who had fish in an aquarium, stuck his organ in the aquarium and they nibbled on it until he orgasmed. John was so excited that he would go out and buy a fish tank. At that time John was physically abusing me by pulling my hair, slapping me, kicking me, stomping on my feet.825

### 8. Prostitution

Witnesses who testified before the Commission and individuals who submitted statements reported several connections between pornography and prostitution. One such connection was the use of pornography as instructional manuals for prostitutes.

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[823] Commercial "erotica" was found at the death scene of forty-four out of 150 accidental autoerotic deaths in the largest study of this subject. R.R. Mazelwood, P.E. Dietz & A.W. Burgess, Autoerotic Fatalities 130-131 (1983).

[824] Houston Hearing, Vol. II, p. 178H1; Herceg et. al. v. Hustler Magazine, Inc., C.A. no.H-82-198, S.D. Texas (1985) (case now on appeal).

[825] Washington, D.C., Hearing, Vol. I, p. 81.

For example, a former prostitute testified:

> One of the very first commonalities we discovered as a group, we were all introduced to prostitution through pornography; there were no exceptions in our group, and we were all under eighteen.
>
> Pornography was our textbook, we learned the tricks of the trade by men exposing us to pornography and us trying to mimic what we saw. I could not stress enough what a huge influence we feel this was.[826]

Another connection was the use of pornographic films by pimps to blackmail the participants:

> I was the main woman of a pimp who filmed sexual acts almost every night in our home. The dope man, who supplied us with cocaine for free in exchange for these arranged orgies, was a really freaky man who would do anything. They arranged to have women, who I assumed were forced to be there, have sex with dogs and filmed those acts. There were stacks of films all over the house, which my pimp used to blackmail people with.[827]

Yet another connection was the use of magazines to stimulate the clientele:

> When I worked at massage studios, the owners had subscriptions to Playboy, Penthouse, Penthouse Forum and the like. These magazines were arranged in the waiting area of most of the massage places which I worked in. If a girl was not inside with a trick, she was expected to sit out front with the men who were waiting or who were undecided and to look at the magazines with them in order to get them titillated. They used the soft porn to help them work up the courage to try the acts described in the magazine with the prostitutes at the massage studio.[828]

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[826] Public Hearings before Minneapolis City Council, Session II, p. 70 (Dec. 1983).

[827] *Id.* at 79.

[828] *Id.* at 77.

## B. Psychological Harm

### 1. Suicidal Thoughts and Behavior[829]

The Commission received testimony from many individuals who reported suicidal thoughts and behavior. These individuals described experiences related to pornographic materials that led them to feel worthless and hopeless, which in turn led to thoughts of suicide or attempts. For example, the mother of an adolescent girl who said she had been molested through the use of pornography testified:

> This is not accomplished overnight, nor is it ever undone. She is now sixteen. She tried to commit suicide at the age of thirteen and a half as her only means of escape. She spent five months in an adolescent psychiatric unit and nineteen months at a residential care facility for twenty-four hour round-the-clock help with her problems. The brunt of the expenses for her care were our responsibility, reaching close to $100,000.[830]

Another witness testified:

> "By age fourteen, I had attempted suicide three times and had been in three different mental hospitals. Never had I revealed to anyone my childhood nightmare. Finally, in an effort to revive our sex life, we began to use pornography. This had a devastating effect on our lives. I began to become very depressed and suicidal again. Though we did become more sexually active, the quality of our relationship deteriorated almost to the point of divorce. Pornography again had

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[829] In some instances the symptoms described may be characteristic of mood disorders. See, DSM-III, supra note 762 at 205-224.

[830] Miami Hearing, Vol II, p. 33-34.

> touched my life in a very destructive way.[831]

A former Playboy bunny testified:

> I was extremely suicidal and sought psychiatric help for the eight years I lived in a sexually promiscuous fashion.
>
> In Los Angeles, my roommate, who was a bunny, had slashed her wrists because she was so suicidal.
>
> Although I received small parts in Godfather II and Funny Lady, had sex with movie stars and producers, I felt worthless and empty. Out of my despair I attempted suicide on numerous occasions.[832]

Other individuals reported suicidal thoughts and behaviors as a result of being forced to participate in the production or use of pornography. For example, a teenage boy who had run away from home reported having been sexually abused by his uncle. He stated he was shown pornographic materials in the course of sexual abuse and he was used in the production of pornographic films:

> He told me they were for him and his friends to view . . . It was a difficult situation for me. And afterwards, I attempted suicide several times.[833]

A woman reported experiences:

> . . . which I found very humiliating and very destructive to my self-esteem and my feeling of self-worth as a person, to prevent these I agreed with him

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[831] Houston Hearing, Vol. II, p. 187R2.

[832] Chicago Hearing, Vol. I, p. 313-14.

[833] Washington, D.C., Hearing, Vol. I, p. 48.

> to act out in privacy a lot of those scenarios that he read to me. A lot of them depicting bondage and different sexual acts that I found very humiliating. About this time when things were getting really terrible and I was feeling very suicidal and very worthless as a person, at that time any dreams that I had of a career in medicine were just totally washed away. I could not think of myself any more as a human being.[834]

A woman who testified that her former husband of eleven years was an avid consumer of pornography and had attempted to force her to view pornographic materials testified that she:

> . . . was very suicidal throughout my marriage; attempted several times.[835]

## 2. Fear and Anxiety Caused by Seeing Pornography

The Commission heard testimony from several witnesses who described fear and anxiety associated with being shown pornography. The anxieties which have been described may be divided into two primary categories: anxiety attributable to memories of prior abuse which are relived through the images portrayed in the pornography being shown; and an overall embarrassment or discomfort in being made to view pornographic materials.

One witness reported being forced by her father to view pornographic materials during the course of an incestuous relationship:

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[834] Public Hearings before Minneapolis City Council, Session II, p. 64 (Dec. 1983).

[835] Houston Hearing, Vol. I, p. 61.

> . . . and of course he had booked a double room. He had all kinds of things in his briefcase, and he pulled out a magazine or book and told me to read it. He sat on the bed and watched me and his facial expression frightened me. I did not want to read it. I did not want to look at those pictures . . . . I was emotionally tortured and I didn't know what to do. I did not like my body or my father's body and having to look at those pornographic pictures forced me to visually memorize painful incidents with my father.[836]

Another witness described similar feelings of anxiety and fear of being shown pornography during the course of sexual abuse in her childhood, beginning when she was ten:

> . . . I have no memory of there being any pornography in the bungalow where we lived. All nine kids slept in one room. My stepfather had his own room. My mother slept on the couch in the living room. The pornography was at the store. The pornography was also in the garage where Carl had some kind of office. He was involved in some kind of activity that needed to be hidden. I have no idea what that was. I remember the pictures on the wall and I remember boxes of books again. These were books I didn't want to look at. Carl's apartment is the place where I remember he made the pornography of me.[837]
>
> As they would show me this pornography, I would look at the pictures and then I would feel real scared . . . .[838]

Other women have described their feelings about pornography and the pain it recreated from a previous abusive experience. One woman appearing before the Minneapolis City Council reported that she currently experiences anxiety upon viewing pornography because it reawakens the experience of sexual abuse she had earlier suffered:

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[836] Washington, D.C., Hearing, Vol. II, pp. 132-33.

[837] Washington, D.C., Hearing, Vol. I, p 223.

[838] _Id_. at 224.

> Two days later, having failed my attempts to keep those images away from me, I was sexually abused in my family. I don't know if the man that abused me uses pornography but looking at the women in those pictures, I saw myself at fourteen, at fifteen, at sixteen. I felt the weight of that man's body, the pain, the disgust . . . . I don't need studies and statistics to tell me that there is a relationship between pornography and real violence against women. My body remembers.[839]

Parents also reported children's lasting fears after abuse. The mother of a girl who reportedly was molested and used in the production of pornography in a California pre-school testified:

> She has also talked about a lot of lights, big strong lights, and she is also very fearful of having her picture taken. My sister was visiting from overseas and tried to take her picture and she hid under the bed.[840]

The second category of fears and anxiety were described primarily by adult women who during the course of an intimate relationship were forced to view pornography by a spouse or close friend. These women described feelings of embarrassment, disgust, and public humiliation:

> My husband is very knowledgeable about the Marquis de Sade. He was raised by prostitutes. One of his stepfathers had what he called the largest pornography

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[839] Public Hearings before Minneapolis City Council Session II, p. 112(Dec. 1983).

[840] Miami Hearing, Vol I, p. 101.

> collection he had ever seen. There was pornographic art throughout his stepfather's home. One evening when we went to visit his mother and his stepfather, the evening's entertainment consisted of getting together with the neighbors and their children and watching a pornography film involving sex with children. I got up, I left the room to throw up; and my husband came over to tell me that I had embarrassed him.[841]

Other witnesses described feelings of humiliation at being forced to view pornography and being subject to ridicule when they demonstrated a reluctance to participate. For example:

> We would meet together as a group at pornographic adult theaters or live sex shows. Initially I started arguing that the women on stage looked very devastated like they were disgusted and hated it. I felt devastated and disgusted watching it. I was told by those men if I wasn't as smart as I was and if I would be more sexually liberated and more sexy, that I would get along a lot better in the world and they and a lot of other men would like me more. About this time I started feeling very terrified.842

The Commission heard testimony from several women whose husbands requested they accompany them to view pornography. These women reported feelings of embarrassment and humiliation as well as a deterioration of the marital relationship:

> I went with him once. I was disgusted with what I saw. I was also very embarrassed to have been seen in the theatre. He continued going by himself and probably never missed a new showing.843

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[841] Houston Hearing, Vol. I, p. 62.

[842] Public Hearings before Minneapolis City Council, Session II, p. 62 (Dec. 12, 1983).

[843] Chicago Hearing, Vol. I, p. 153-54.

Another woman testified:

> He would take me to the pornography stores here in Houston with the intention of going to get a newspaper or going to get a Better Homes and Gardens. Before I knew it, he would kind of lead me back into the second part of the store. I think that only happened twice because I would get so upset and traumatized . . . .[844]

Yet another woman experienced fear and anxiety when she listened to Dial-A-Porn messages that her son had been calling:

> The chilling horror I felt in my kitchen after my first encounter with Dial-A-Porn lingers with me today. After my initial reaction of disbelief subsided, I was overcome with grief. I cried uncontrollably for myself, my son . . . .845

### 3. Feelings of Shame and Guilt[846]

The Commission heard testimony from many witnesses who described feelings of worthlessness, guilt, and shame which they attributed to experiences involving pornographic materials.

> As an adolescent, I was sexually molested in my own home by a family member who regularly used pornographic materials. I have been threatened at knifepoint by a stranger in an attempted rape. I have been physically and verbally harassed on the street, in other public places, and over the telephone at all hours of the night. I have experienced and continue to experience the humiliation, degradation, and shame that these acts were meant to instill in me.
>
> This connection became clear to me when I saw a

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[844] Houston Hearing, Vol. I, p. 58.

[845] Los Angeles Hearing, Vol. I, p. 265.

[846] These symptoms may be reflective of Post-traumatic Stress Disorder. See, DSM-III, supra note 762, at 238.

> documentary about pornography called Not a Love Story. I realized that I was any one of the women in the film, at least in the eyes of those men who have abused me. I saw myself through the abusers' eyes and I felt dirty and disgusting, like a piece of meat. It was the same shame and humiliation as in the other experiences.[847]

The Commission also heard testimony from people who experienced feelings of guilt and shame when shown pornography:

> It was important to me to try and stop the feelings of embarrassment because then I thought that they would not be able to see my shame. Somehow I thought they watched me, waited to see my reaction to the pornography and then they would continue holding it up in front of me to make me squirm. I felt humiliated and hollow.848

Guilt and shame were also reported by witnesses as feelings associated with the production of pornography. For example, a young man who was used in the production of pornography as an adolescent testified:

> A couple months later I went into the Straight program, and I talked about it a couple of times, why I would do it. Take her money and go down to buy cocaine with it. I just felt it really disgusted me and I shamed myself.849

A statement submitted to the Commission by the National Conference of Judges discussed the feelings of guilt and shame that victims experience because of the production and use of homemade pornography.

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[847] Public Hearings before Minneapolis City Council, Session III, p. 126 (Dec. 1983).

[848] Washington, D.C., Hearing, Vol. I, p. 225.

[849] Washington, D.C., Hearing, Vol. I, p. 170.

> . . . collections of self-made pornography detailing who their victims were and the acts they committed. This is a particularly traumatic issue for many of the victims that we treat. It is a source of extreme shame and embarrassment for the victims that pictures of the activity between them and the offender exist. We may not have all those pictures, copies of the pictures may have been sold or traded to other collectors, and we may not have found the entire collection. These collections are catalogued at the Bureau of Criminal Apprehension and continue to exist long past the time when the crime has been reported. . . .
>
> In many of our incest families, the perpetrators use pornography as tools or guides in order to initiate their family members into sexual behavior. Manuals and books that speak of father-daughter love, father-son sex, or family love have been used to rationalize and validate this kind of behavior.
>
> Many of our child molesters, both juvenile and adults, have utilized both adult and child pornography as a way to initiate their victims into the sexual behavior as well as a tool or guide for the sexual behavior of child molesting. Many of our victims blame themselves and feel a great deal of culpability because they believed the original depiction from pornography as being normal behavior between adults and children.[850]

In a letter presented to the Minneapolis City Council, a woman described her public embarrassment and shame at seeing what seemed to be a photograph of herself:

> It was a full length figure, naked except for high heeled shoes and stockings, taking off a shirt. Never in my life had I posed for any photograph, drawing or painting remotely similar to this image. The people giving me this laughed, thought it was funny, thought I would find it funny and truly meant no harm--they are all talented, intelligent, nice people, an indication of the extent of the pornographic mind set we all suffer under. I felt upset, ripped-off, diminished, insulted, abused, hurt, furious and powerless. All of

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[850] National Conference of Judges, October 12, 1986.

> which I concealed from my friends by smiling and saying, "Where did you get this?" (For the moment I thought they had it made up by the art department at the studio.) "From a magazine" was the answer. Added to the aforementioned reactions was horror! I thought, "this has been published! It is publicly available for anyone to see and assume I may have posed for it."
>
> I curtailed my honest reaction because in a few minutes we would all have to begin filming our show--which we did. They, thinking it had been a fun joke, me in a great deal of pain and distress.[851]

## 4. Fear of Exposure through Publication or Display of Pornographic Materials.

Some witnesses feared the future dissemination of pornography which had been made of them. For example, a woman who had been forced to participate in the filming of pornography testified:

> But there still exists the pornography that was made of me. I know the men who made it, I know where they are, and there is nothing I can do about it. I live knowing that at any time it could surface and could be used to humiliate me and my family. I know that it can be used to ruin my professional life in the future. I know because some of it was produced within months before my eighteenth birthday that it is protected under current law.[852]

Linda Marchiano, who appeared in the film Deep Throat as Linda Lovelace, testified:

> I have a son who will be ten in April. My daughter

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[851] Public Hearings before Minneapolis City Council, Session III, p. 4(Dec. 1983).

[852] Washington, D.C., Hearing, Vol. I, p. 189.

> Lindsay will be six on the 4th of July. There are times when my phone rings and it's just obscene phone calls and people saying the typical kind of degradation they say on the telephone. And it's hard because, how do you say to these people, come on, you are hurting my six- and my nine-year-old children. That hurts and it does hurt that the film is still being shown.
>
> I mean, we have a video store in our town, and we have a VCR, and I will go into that store and get my tapes. I will go to the next town to get them. I just don't feel that store should have that film in the town that I live, but there is nothing I can do about it.
>
> I have no rights as a victim. The only right I have is to be able to tell my story and hope that someone listens.[853]

The young man who had been sexually abused by his uncle and used in the production of pornography testified:

> The sexual abuse that was afflicted on me lowered my self-esteem and the films reminded me of that. I was afraid that this would be shown to the world.[854]

A woman who reported that she was forced into prostitution at age thirteen after running away from a sexually abusive home testified that she was forced to participate in the production of pornographic films and tapes:

> It was clear to me that in the years I was in prostitution that all of the women I met were systematically coerced into prostitution and pornography in the same way a prisoner of war is systematically imprisoned, tortured and starved into compliance by his captors. The difference is that prisoners of war are not held responsible for coerced statements and acts but when a girl or woman is coerced in this very manner into prostitution and for use in

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[853] New York Hearing, Vol. I, p. 54-55.

[854] Washington, D.C., Hearing, Vol. I, p. 49.

pornography, she is held responsible.

> This pimp made pornography of all of us. He also made tape recordings of us having sex with him and recordings of our screams and pleading when he gave us brutal beatings. It was not unusual for him to threaten us with death. He would later use these recordings to humiliate us by playing them for his friends in our presence, for his own sexual arousal, and to terrorize us and other women he brought home.[855]

According to the submission on behalf of the National Judges Conference, the continuing existence of pornography impedes treatment of victims:

> The therapeutic issue for the victim to complete treatment is the need to put the crime in the past, an impossibility when there is an existing pictorial history.[856]

5. Amnesia and Denial and Repression of Abuse[857]

The Commission heard accounts from several witnesses who were unable to recall portions of their lives or specific events. These witnesses attributed their amnesia to trauma associated with the production or use of pornography. The woman who had been sexually abused and forced to participate in the production and viewing of pornography from age ten testified:

> I do not remember the exact beginning of my personal

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[855] Washington, D.C., Hearing, Vol. II, p. 183.

[856] National Judges Conference, October 12, 1986.

[857] These symptoms may be reflective of Post-traumatic Stress Disorder (PTSD). See, DSM-III, supra note 762 at 238.

> war.[858]
>
> In 1984 is when I started to speak publicly against pornography because it was during that year that I learned and remembered that I was victimized as a child. Prior to that time I had no memory of it.[859]
>
> My upset has to do with not being able to remember exactly the beginning, or for that matter, the lost segments of time such as a year or two of my life.[860]
>
> It is essential, if one is to survive years of physical abuse, whether one is a child or an adult, to distort one's reality and live in denial.[861]

Witnesses described various psychological mechanisms they used to endure the sexual abuse or humiliation associated with pornography:

> Sometimes I would make believe I was in a coma and I'd have to lay absolutely still, because people in comas don't move. So I would set about my task by practicing how not to move and how not to make a sound.[862]
>
> . . . and because of what my family life was like, I learned to cope with being shown pornography.
>
> The way I did that was I would behave as if I was looking at the pictures. But I would not directly look at them. I would make believe that I was blind, that I could not see. In my mind I said to myself, I do not see them, but then concentrated on not allowing my body to respond in any way that would be visible to them. I repeated to myself over and over again, don't move any part of your body. Somehow I believed if I denied the feelings that I could forget the experience, which I later translated to it never happened, and I had

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[858] Washington, D.C., Hearing, Vol. I, p. 220.

[859] Id. at 219.

[860] Id. at 220.

[861] Id. at 231.

[862] Id. at 230.

stayed that way for twenty years.[863]

A woman who said she had been sexually and emotionally abused since childhood through the use of pornography and who said she suffered from multiple personality testified:

> In every episode with him are ones I realized that I could not avoid his advances; I would put myself in a trance-like state and pray for it all to be over with as soon as possible.[864]
>
> . . . Then, like an internal sore, the repressed memories began erupting, baring all of my symptoms and anxiety; I looked for the long-term help that I knew I would need.[865]
>
> . . . It has been extremely difficult for me to write my testimony. I am only now, because of the request that I testify today, beginning to remember the pornography to which I was subjected. The memories that I have relived completely have been of a physical nature, the extreme traumas which were responsible for my splitting. I feel that I have been so desensitized that the memories of having been shown pornographic pictures have seemed harmless and therefore, until now, there has been no need to remember them.
>
> * * *
>
> . . . trauma of my relationship with my stepfather, and the role pornography played. Each time I have reread what I have written I am so reappalled, rehorrified and retraumatized myself that I decided it more important to just tell you that I knew pornographic magazines played a large part in my stepfather's life. I do not remember in detail the magazines he used, but I do know that they were of a sado-masochistic nature.[866]

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[863] Id. at 224.

[864] Washington, D.C., Hearing, Vol. II, p. 262.

[865] Id. at 264.

[866] Id. at 258-59.

### 6. Nightmares[867]

The mother of an adolescent girl who said she had been sexually abused through the use of pornography testified that her daughter had recurrent nightmares of the abuse:

> He used this magazine to get her to do the same type of thing to him and as a tool to instruct her as to how he wanted her to pose for his nude photographs. To this day, she has nightmares and is continually remembering additional details of his assaults.[868]

### 7. Compulsive reenactment of sexual abuse and inability to feel sexual pleasure outside of a context of dominance and submission.[869]

Many witnesses described an inability to engage in healthy sexual relationships, including reports of a seeming need for abuse or unhealthy dominance. One woman whose husband was an avid consumer of pornography testified:

> This obsession and addiction did not enrich our sex life. It robbed me of a loving relationship, and our sex life turned to his masturbating with his pornography.[870]

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[867] This symptom may be reflective of Post-traumatic Stress Disorder. DSM-III, supra note 762, at 238.

[868] Miami Hearings, Vol. II, p. 32.

[869] These described symptoms may be characteristic of Post-traumatic Stress Disorder and Sexual Masochism. See, DSM-III, supra note 762, at 238,274.

[870] Chicago Hearing, Vol. I, p. 154.

Another witness testified:

> My unhealthy concept of sex began when I was a child between the ages of seven and nine. At that time I was introduced to both pictorial and written pornography. This was over fifty-five years ago. My entire concept of what sex was all about came from these materials.[871]

A woman who had been forced to participate in the production and viewing of pornography testified:

> So at night in order to go to sleep I would act out scenes in my head of being tortured and I had to practice how to endure extreme pain. This is how I put myself to sleep at nights as a child. As an adult, instead of having to imagine these scenes, John acted out his violent sadomasochistic fantasies on my body.[872]

* * *

> I lived with [a man]. One day he told me he had fantasies; fantasies of tying up a woman and using whips. I told him I had the same fantasies. In fact I have been having those fantasies since I was at least twelve or thirteen years old. One of the ways I would put myself to sleep at night as a child was I would run skits through my head and the main character I would act out was me. I was always being hurt.[873]

A former Playboy bunny testified:

> My first association with Playboy began in childhood when I found Playboy as well as other pornographic magazines hidden around the house. I have since discovered that a great deal of pornography ends up in the hands of the children. This gave me a distorted

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[871] Houston Hearing, Vol. II, p. 178BB1.

[872] Washington, D.C., Hearing, Vol. I, p. 230.

[873] *Id.* at 229-30.

> image of sexuality. Pornography portrays sex as impersonal and insatiable.[874]

8. Inability to experience sexual pleasure and feelings of sexual inadequacy.

A woman whose father had used pornography in his sexual abuse of her from the age of three testified:

> I was nothing but a pornographic tool for his use. I cannot distinguish the difference between sex and pornography. Because of my sexual abuse as a child I am extremely against pornography, and because of pornography I cannot enjoy sex.875

Other witnesses attributed feelings of sexual insecurity and inadequacy to experiences with pornography. For example, a woman whose husband attempted to force her to view pornography testified:

> It was at that point, early in our relationship, that I began to think that there was something wrong with me. After all, if I loved this person, why didn't I share his enthusiasm?[876]

Another woman who said her husband had sexually abused her through the use of pornography testified:

> I thought that I was either a frigid, uncaring wife, but that's the idea; I have received messages from my

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[874] Chicago Hearing, Vol. I, p. 312.

[875] Chicago Hearing, Vol. II, p. 98

[876] Houston Hearing, Vol. I, p. 58-59.

husband.[877]

Another woman whose husband was an avid consumer of pornography testified:

> It finally progressed to the desire for exchanging parties and sex orgies with many partners. He again told me there was something wrong with me because I would not share him with others and I did not enjoy sex.[878]
>
> * * *
>
> I can still remember when I told him I still loved him and I would not divorce him if he would change. He said I was sexually cold and selfish . . . .[879]
>
> He was convinced there was something wrong with me because I could no longer respond to him. In fact, I felt very uncomfortable whenever he touched me. He continually told me I was cold, even though he had nothing to offer me. And I believe this was justifying his involvement with pornography.[880]

## 9. Feelings of Inferiority and Degradation

Some individuals described situations in which pornography had been used to instill feelings of racial inferiority. For example, one woman testified before another body:

> In thinking about coming here today to speak, I realized that my life would be in danger. As a woman of color these dangers seem many and great, an absolute loss of credibility and respect, wrath and disgust, potential violence both verbal and physical, and

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[877] Chicago Hearing, Vol. I, p. 24.

[878] Chicago Hearing, Vol. I, p. 154.

[879] _Id_. at 157.

[880] _Id_. at 154.

> ridicule and harassment to name a few. I also realized the dangers to my life if I did not come. These dangers being complacency, letting go of my rage and terror about pornography and its impact on my life, accepting that the shame is mine, accepting that I am the slut and the whore that deserved what was done to me, believing that I am usable. I have no illusions about men not seeing me as a slut, they do.[881]

Witnesses also described the pornography was used to degrade them as women. For example, a woman whose husband used pornography to abuse her testified:

> As a result of this I developed a very low self esteem. I felt emotionally isolated because of the fear and embarrassment.[882]

Another woman said:

> He showed me art books and also books, magazines of pornography. And as he was showing me these works, he was doing critique of women's bodies, of their facial expression, of parts of their bodies and of their dress. Following this was a critique of my too athletic, too muscular body. I was seventeen, it was very devastating to me that my body was being torn apart in this way.[883]

Another woman testified:

> Once he insisted that we go see an X-rated movie at a theatre that showed pornography exclusively. I remember feeling humiliated and frightened being the only woman in the room while the men around me sat masturbating openly. I kept my eyes glued to the top

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[881] Public Hearings before Minneapolis City Council, Session II, p. 47. (Dec. 1983).

[882] Chicago Hearing, Vol. I, p. 25.

[883] Public Hearings before Minneapolis City Council Session II, p. 58 (Dec. 1983).

> of the screen and prayed for it to be over soon. When we got home, he demanded sex.[884]

A witness who appeared before the Minneapolis City Council described feelings of inferiority and inadequacy:

> When we arrived, he informed me that the other men at the party were envious that he had a girl friend to fuck. They wanted to fuck too after watching the pornography. He informed me of this as he was taking his coat off.
>
> He then took off the rest of his clothes and had me perform fellatio on him. I did not do this of my own volition. He put his genitals in my face and he said, "Take it all." Then he fucked me on the couch in the living room, all this took about five minutes. And when he was finished he dressed and went back to the party. I felt ashamed and numb and I also felt very used.
>
> This encounter differed from others previous, it was much quicker, it was somewhat rougher, and he was not aware of me as a person. There was no foreplay. It is my opinion that his viewing of the pornography served as foreplay for him.
>
> * * *
>
> . . . this usual treatment did result in feelings of low self-esteem, depression, confusion and a lot of shame.[885]

The Commission received reports from individuals who described feelings of exploitation through a partner's use of pornography in an intimate relationship:

> He was a lover. He'd go to porno movies, then he'd come home and say, I saw this in a movie. Let's try

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[884] Washington, D.C., Hearing, Vol. I, p. 186.

[885] Public Hearings before Minneapolis City Council, Session II, p. 54-55 (Dec. 1983).

> it. I felt really exploited, like I was being put in a mold.[886]

A young man who had been forced to engage in sexual acts for the production of pornography testified that he and other boys who had been exploited by a sex ring felt stigmatized by the publicity surrounding the investigation and prosecution of the offenders:

> Those of us who were involved in the ring never talked about it. We wanted to forget the experience. But since my name became public I couldn't escape the stigma of being involved in the . . . sex scandal. I started taking drugs heavily at age twelve to try to cope with the situation.[887]

A woman who had herself been forced into prostitution and the production of pornography testified:

> My first husband was always withdrawn and had very little self esteem. He was a sad young man. People often felt sorry for him. He died before his twenty-fifth birthday in a drunken car accident. Just a few months ago I learned something that helped explain his low self-esteem, his alcoholism, and his avid consumption of pornography. I saw a picture of him as an adolescent in a child pornography photograph in a Women Against Pornography display.888

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[886] Public Hearings before Minneapolis City Council, Session I, p. 65 (Dec. 1983).

[887] Washington, D.C., Hearing, Vol. II, p. 48.

[888] Washington, D.C., Hearing, Vol. I, p. 186-87.

### 10. Feelings of Frustration with the Legal System

The Commission heard testimony describing feelings of frustration and problems with the legal system. Some of the witnesses described helplessness and frustration which they thought could have been alleviated if they had been provided guidance in seeking legal redress. For example, one woman wrote:

> Please, please, use their experience and knowledge and work with them. They have tried to get legislation passed against the evils of pornography, for instance the Minneapolis ordinance . . . . Lastly, there are many women's organizations which have been working hard against the evils of the ever-growing, and increasingly more violent pornography which is making our society even more sick.[889]

Linda Marchiano testified:

> . . . [A]t a grand jury hearing in California after they had watched a porno film, they asked me why I did it. I said, "Because a gun was being pointed at me" and they just said, "Oh, but no charges were ever filed." I also called the Beverly Hills Police Department on my final escape and I told them that Mr. Traynor was walking around looking for me with an M-16. When they first told me that they couldn't become involved in domestic affairs, I accepted that and told them that he was illegally possessing these weapons and they simply told me to call back when he was in the room. [890]

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[889] Letter to the Attorney General's Commission on Pornography.

[890] Public Hearings before Minneapolis City Council, Session I, p. 49 (Dec. 1983).

A young man who had been forced to participate in the production of pornography testified:

> During the trial the only name to come out in the newspaper was my name. I was eleven years old at the time.[891]

A woman whose memories of abuse and forced participation in the production of pornography had remained buried for many years testified:

> If we had the civil ordinance passed, if I had access to something like that, I would be able to pull through the part of me that exists today. I have no means of doing so. All of the statutes of limitations have run out. Most of the time the women that have been abused, statutes of limitations have run out before we even remember we have been sexually abused.[892]

Another woman testified:

> When I think that police, attorneys, legislators, jurors, judges, school teachers and doctors of our country can be desensitized to the suffering of a child, it angers me. A child's justice has been thwarted by the preconditioning of emotions. Victims of sexual violence don't get a fair trial. The true emotions that should be felt have been replaced by sexual fantasies. Victims are a curiosity. People come to see us talk about our genitals as if we are some form of entertainment. Our trial becomes an extension of pornography. So much that even nude

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[891] Washington, D.C., Hearing, Vol. II, p. 47-48.

[892] Washington, D.C., Hearing, Vol. I, p. 236-37.

> photos of us are passed around. 893

Another woman who had been forced into prostitution and the production of pornography alleged that policemen and juvenile facility workers had been among her abusers:

> I don't think that consent was a possibility for a girl who was delivered into the hands of organized crime figures in New Jersey in the dead of night. Others might wonder why I didn't turn to the police for help. As a matter of fact I didn't have to walk all the way to our local headquarters to speak to the police. They were at our apartment every week for their payoff--me.
>
> * * *
>
> When I was sixteen I was sentenced to juvenile detention by the courts. My incarceration was a nightmare of sexual abuse at the hands of the male employees of the facility. One young girl complained to her parents about this on visiting day. That night, after her parents left, she was made an example of. We heard her cries and pleading all night. The official story the next morning was that she had tried to runaway, was caught, and was being held in isolation.
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> * * *
>
> Soon after I was transferred to a facility upstate. When I saw my opportunity I escaped.[894]

### 11. Abuse of Alcohol and Other Drugs 895

Several of the witnesses reported the use of various drugs,

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[893] Houston Hearings, Vol. II, p. 291B3.

[894] Washington, D.C., Hearing, Vol. I, p. 182.

[895] These symptoms are characteristic of substance abuse disorders. See, DSM-III, supra note 762, at 163.

including alcohol, in connection with the manufacture of pornographic materials. A former Playboy bunny testified:

> Drug abuse is deeply interwoven into the Playboy lifestyle. I saw marijuana being used at Hefner's mansion on a regular basis, and cocaine as well. I began taking moderate amounts of alcohol and tranquilizers thinking it would do no harm but the lust grows for more drugs and alcohol to desensitize the psyche to the sexual perversion. 896

Some witnesses stated that drugs were used to induce an individual to participate in the production of pornography. For example, a woman who had run away from sexual abuse at home at age thirteen described the use of drugs and nude photographs to initiate her into prostitution:

> The third night I was away from home I was wandering around the streets in a sort of daze when I was befriended by a man about twenty years my senior.
>
> I confided my problems to him and he offered to take me in. During my stay with him he treated me relatively well. He was kind to me, he fed me, and he said he cared about me. He also kept me drugged, spoke glowingly about prostitution and took nude photographs of me.[897]

A young woman who had suffered years of sexual and emotional abuse testified:

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[896] Chicago Hearing, Vol. I, p. 315-16.

[897] Washington, D.C., Hearing, Vol. I, p. 177.

> I recall at times, from age thirteen until fifteen, having been drugged and used in group demonstrations . . . .
>
> Money, grass and alcohol were used as inducements by [two of the men in the sex ring] in their seduction process. [One] would use the school bus to pick us up and take us over to another's house in Revere. We were paid five dollars plus we were given beer and grass.[898]

Another young man testified:

> When I was young, my uncle sexually molested me. He introduced me to alcohol and drugs. He took nude photographs of me with body paint . . . .[899]

A woman who at eighteen became a nude model and posed f pornographic films testified:

> He had me sign a contract, so that scared me, because I had to go to the office every day, you know, and he would try to tell me that soon I would be there, I would be famous. He got me involved with drugs and made me service him, and if I didn't he would threaten me.[900]

The Commission also heard testimony from witnesses who us the money received for participation in prostitution a pornography to buy drugs. A young man who had been forced participate in the manufacture of pornography testified:

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[898] Washington, D.C., Hearing, Vol. II, p. 46, 48.

[899] Washington, D.C., Hearing, Vol. I, p. 47.

[900] Los Angeles Hearing, Vol. I, p. 93.

> I spent all the money on drugs. While hustling, quite often I would be picked up by a guy and taken to his house where he would show me homosexual porn films to get him and me turned on. Many times I would be photographed in pornographic poses for private collections. Most often I was involved in prostitution with guys.[901]

Other witnesses said that they used alcohol and other drugs to escape mentally from the abuse they were suffering. For example, one woman testified:

> I escaped prostitution quite by accident. I became a heroin addict. I had been taking other drugs throughout the time I was in prostitution and pornography. They had been supplied and doled out by my pimp. I accepted them because they numbed my physical and emotional pain. [902]

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[901] Washington, D.C., Hearing, Vol. II, p. 46, 48.

[902] Washington, D.C., Hearing, Vol. I, p. 182.

## C. Social Harms

### 1. Loss of job or promotion/sexual harassment

Reports of sexual harassment similar to those described i the "Physical Injuries" section were also submitted as forms o social injuries. The witnesses stated the harassment wa attributable to the presence of pornographic materials and serve to reduce their social status.

> I was working as a telephone repairwoman for Southern Bell in Florida. Porn was everywhere. They use it to intimidate you, to keep women out of their territory. They had pin-ups in the workrooms. Male workers would draw pornographic pictures of women workers in the cross-boxes and write comments about what we would do in bed. One day I went to the supply room to get some tools. The inside of the room was covered with pornography. The guy who ran it shoved a photograph at me of a woman's rear end with her anus exposed and asked, 'Isn't this you?' I was humiliated and furious.[903]
>
> When I got on the job, three of the trades had set up a nice little shack and had lunch there. And it was a real shock when I walked in because three of the four walls in the room were completely decorated with pictures out of various magazines, *Hustler*, *Playboy*, *Penthouse*, *Oui*, all of those. Some of them I would have considered regular pinups but some of them were very, very explicit, showing women with their legs spread wide and men and women performing sex acts and women in bondage. It was very uncomfortable for me to go down there and have dinner and lunch with about twenty men and here is me facing all these pictures and hearing all these men talking about all the wonderful things they did on the weekend with all of these women. I put up with it for about a week and it finally got to

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[903] Letter to Women Against Pornography submitted to the Attorney General's Commission on Pornography.

> the point where I could no longer tolerate sitting there and realizing that all of these men were there, I felt totally naked in front of these men.[904]

> A working woman called the Pornography Resource Center in May 1984 to report that her employer had called her into his office, pushed her down on the floor, ripped her dress, taken a gun out of his pocket, and stuffed it into her vagina. A pornographic picture on the lunchroom wall showed a woman sucking a gun."[905] Many of the complaints received by Amici are from women workers in nontraditional jobs. The following is typical: "I've been a brakewoman for the railroad for almost nine years . . . . I've seen pornographic pictures of a woman with spread thighs being raped by a huge dismembered penis with my name below.[906]

### 3. Financial Losses

The Commission heard reports from individuals who encounter financial consequences attributable to experiences with pornography. Many of these witnesses stated they had suffered financial difficulty because of the need to seek medical and mental assistance because of injuries they attributed to pornographic materials:

> The tangible costs are real and run over five hundred dollars per month for weekly therapy, monthly consultations and outside testing. The hospitalization was nearly thirty thousand dollars. Most major insurance policies have a lifetime maximum benefit of ten to twenty thousand dollars on this type of problem; after

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[904] Public Hearings before Minneapolis City Council, Session II, p. 85-86(Dec. 1983).

[905] Testimony to Women Against Pornography, Feb. 1985.

[906] Letter from Montana woman to Women Against Pornography submitted to the Attorney General's Commission on Pornography.

> that if the victim needs help guess who pays. This has a real dollar cost of over seventy thousand dollars so far with many months and perhaps years to go.
>
> My oldest daughter has been in therapy for nearly four years receiving help including a two month hospitalization period for evaluation.[907]

> Our four year old daughter was sexually molested at a preschool that she attended in Hermosa Beach, California. She attended the school, . . . for approximately ten months in 1984. She was two years old . . . .
>
> She has spoken on many occasions where she was taken to certain residence and other locations where she was molested by strangers and threatened with guns and knives and also photographed. All of this was being kept secret through the continuous threats to our daughter that we would leave her, or, worse, that she would die if we were told the secret.
>
> We spent the past year trying to help our daughter through the fears and anxiety over this experience. She is, and has been for about a year, undergoing psychotherapy on a weekly basis. I have also been receiving psychotherapy . . . .[908]

### 3. Defamation and Loss of Status in the Community

The Commission received testimony from witnesses wh reported that pornographic materials were used to place them in bad light. The witnesses stated that they had been depicted i pornography without knowledge or consent. Although avenues o recourse may have been available, some were advised to avoi further adverse publicity. For example, one woman testified:

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[907] Houston Hearing, Vol. II, Anonymous, p. 178Q1-4.

[908] Miami Hearing, Vol. I, p. 93-94.

> The buyer had their choice of seven famous women pictured in the nude; all of our full names were listed and, of course, choice of color of T-shirt. I was appalled and angry and had meetings with a lawyer regarding what action I should take. All my then advisers, this attorney, my personal manager (regarding career) and my business manager (regarding accounting and finances) advised strongly against taking any action whatsoever. They all concurred that it would be extremely costly and would draw attention to and sell more of these shirts." 909

Other witnesses stated that pornographic materials were used to hinder their standing within the community. This apparently was particularly true for individuals who had at one time been depicted in pornography. For example, Linda Marchiano testified:

> And the fact that this film is still being shown and that my three children will one day walk down the street and see their mother being abused, it makes me angry, makes me sad. Virtually every time someone watches that film, they are watching me being raped.910

4. Promotion of Racial Hatred

The Commission received statements identifying pornography as a tool to promote racial bias and hatred. Witnesses identified specific pornographic materials which portray persons of color in a derogatory manner. These individuals attributed continued stereotyping and feelings of racial inferiority to the

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[909] Public Hearings before Minneapolis City Council, Session III, p. 5(Dec. 1983)

[910] Public Hearings before Minneapolis City Council, Session I, p. 56(Dec. 1983).

pornographic materials:

> They made other comments, "The only good Indian is a dead Indian." "A squaw out alone deserves to be raped." Words that still terrorize me today.
>
> It may surprise you to hear stories that connect pornography and white men raping women of color. It doesn't surprise me. I think pornography, racism, and rape are perfect partners. They all rely on hate. They all reduce a living person to an object. A society that sells books, movies, and video games like "Custer's Last Stand" on its street corners gives white men permission to do what they did to me. Like they said, I'm scum. It is a game to track me down, rape, and torture me.[911]

### 5. Loss of Trust within a Family

The Commission heard reports of family problems attributed to pornography that were more subtle than some of the massive family ruptures described earlier in this Chapter. Some individuals stated that when a family member used pornography or was subjected to the use of pornography, other members of the family felt the effects. For example, a woman who had been forced to view and participate in the production of pornography in childhood by family members testified:

> . . . I am the only member of my family who is speaking out. I am the only member of my family saying "no" to the abuse. It is very, very common that our families lose themselves from us. I have no support with the exception of one younger brother. My family is very

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[911] Public Hearings before Minneapolis City Council, Session II, p. 19,(Dec. 1983).

> angry at me for saying "no" to the abuse. They are very angry about the fact I am identifying it.
>
> My sisters, they are all repeating the cycles of abuse. They are abusing their children and their children are being incested. This is the long-term cycles, the repeating and maintaining of violent life cycles.[912]

6. Prostitution

Witnesses who testified before the Commission and individuals who submitted statements reported several connections between pornography and prostitution. One such connection was the use of pornography as instructional manuals for prostitutes. For example, a former prostitute testified:

> One of the very first commonalities we discovered as a group, we were all introduced to prostitution through pornography; there were no exceptions in our group, and we were all under eighteen. Pornography was our textbook, we learned the tricks of the trade by men exposing us to pornography and us trying to mimic what we saw. I could not stress enough what a huge influence we feel this was.[913]

Another connection was the use of pornographic films by pimps to blackmail the participants:

> I was the main woman of a pimp who filmed sexual acts almost every night in our home. The dope man, who supplied us with cocaine for free in exchange for these

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[912] Washington, D.C., Hearings, Vol. I, p. 241.

[913] Public Hearings before Minneapolis City Council, Session II, p. 70(Dec. 1983).

> arranged orgies, was a really freaky man who would do anything. They arranged to have women, who I assumed were forced to be there, have sex with dogs and filmed those acts. There were stacks of films all over the house, which my pimp used to blackmail people with.[914]

Yet another connection was the use of magazines to stimulat the clientele:

> When I worked at massage studios, the owners had subscriptions to Playboy, Penthouse, Penthouse Forum and the like. These magazines were arranged in the waiting area of most of the massage places which I worked in. If a girl was not inside with a trick, she was expected to sit out front with the men who were waiting or who were undecided and to look at the magazines with them in order to get them titillated. They used the soft porn to help them work up the courage to try the acts described in the magazine with the prostitutes at the massage studio.[915]

Women who are or who have been prostitutes identifie pornography as a significant factor in prostitution. Thes individuals reported that pornography was not only used and mac of them while engaged in acts of prostitution, but they state that pornography is used to perpetuate the concept that women ar accustomed to being placed in the role of a prostitute.

> I am speaking for a group of women, we all live in Minneapolis and we all are former prostitutes. All of us feel very strongly about the relationship between pornography and prostitution. Many of us wanted to testify at this hearing but are unable because of the

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[914] Id. at 79.

[915] Id. at 77.

> consequences of being identified as a former whore. This is absolutely incredible to me that prostitution is seen as a victimless activity and that many women are rightly terrified of breaking their silence, fearing harassment to themselves and families and loss of their jobs.
>
> We have started to meet together to make sense of the abuse we have experienced in prostitution and how pornography endorses and legitimizes that abuse.[916]

### 7. Sexual Harassment in the Workplace

Several women reported incidents of sexual harassment in the workplace involving the display and use of pornography. For example, one woman said:

> I put up with it for about a week and it finally got to the point were I could no longer tolerate sitting there and realizing that all of these men were there, I felt totally naked in front of these men. The only thing they talked about during lunch period was women, their old ladies, their girl friends, and all their conquests of the weekend.
>
> I got to the point where I couldn't put up with it any more. And being one of the only two women on the job and being rather new at it and not knowing that I had any alternatives, I got pissed off one day and ripped all the pictures off the wall. Well, it turned out to be a real unpopular move to do. I came back in at lunch time and half the pictures were back up again, they pulled them out of boxes and stuck them on the wall and proceeded to call me names. And just basically call me names or otherwise ignore me.[917]

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[916] Id.

[917] Public Hearings before the Minneapolis City Council, Session II, p. 86(Dec. 1983).

Another woman wrote:

> I was working as a telephone repairwoman for Southern Bell in Florida. Porn was everywhere. They use it to intimidate you, to keep women out of their territory. They had pin-ups in the workrooms. Male workers would draw pornographic pictures of women workers in the cross-boxes and write comments about what we would do in bed. One day I went to the supply room to get some tools. The inside of the room was covered with pornography. The guy who ran it shoved a photograph at me of a woman's rear end with her anus exposed and asked, "isn't this you?" I was humiliated and furious.[918]

A woman testified before another body:

> When I got on the job, three of the trades had set up a nice little shack and had lunch there. And it was a real shock when I walked in because three of the four walls in the room were completely decorated with pictures out of various magazines, *Hustler*, *Playboy*, *Penthouse*, *Oui*, all of those. Some of them I would have considered regular pinups but some of them were very, very explicit, showing women with their legs spread wide and men and women performing sex acts and women in bondage. It was very uncomfortable for me to go down there and have dinner and lunch with about twenty men and here is me facing all these pictures and hearing all these men talking about all the wonderful things they did on the weekend with all of these women. I put up with it for about a week and it finally got to the point where I could no longer tolerate sitting there and realizing that all of these men were there, I felt totally naked in front of these men.[919]

Another woman wrote:

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[918] Letter to Women Against Pornography submitted to th
Attorney General's Commission on Pornography.

[919] Public Hearings before Minneapolis City Council
Session II, p. 85-86(Dec. 1983).

> A working woman called the Pornography Resource Center in May 1984 to report that her employer had called her into his office, pushed her down on the floor, ripped her dress, taken a gun out of his pocket, and stuffed it into her vagina. A pornographic picture on the lunchroom wall showed a woman sucking a gun." "Testimony to Women Against Pornography, Feb. 1985. Many of the complaints received by Amici are from women workers in nontraditional jobs. The following is typical: "I've been a brakewoman for the railroad for almost nine years . . . . I've seen pornographic pictures of a woman with spread thighs being raped by a huge dismembered penis with my name below.920

Similar to the harassment reported above, women identified pornography as a tool to continue sexual harassment. Women stated that pornography continued to perpetuate the harassment and alienation.

> After the LEAP Offices and State had written letters to send out to these various employers, my boss, the man who owned the company, called me up one day and said, "Look, I heard you are having a little trouble down there, why don't you just kind of calm down a little bit. Don't make such a mess. We don't need any trouble down there, just calm down, just ignore it." I said, "Hey, I can't ignore it, I don't have to, I can't, it is already done." A couple days later they got the letter and they were told that this did not comply with the action guidelines.921

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[920] Letter from Montana woman to Women Against Pornography submitted to the Attorney General's Commission on Pornography.

[921] Public Hearings before Minneapolis City Council, Vol. II, p. 88(Dec. 1983).

## Chapter 2

## The Use of Performers in Commercial Pornography

A. Background
  1. Terminology and Distinctions
  2. Previous Commission Findings
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B. Use of Performers in Pornography - The Evidence
  1. The Nature of the Evidence
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  4. Modeling and Personal Life

C. Conclusions and Recommendations

   1. Modeling and Prostitution
   2. Sex Discrimination
   3. Invasion of Personal Rights

> The objective nature of photography confers on it a quality of credibility absent from all other picture-making. . . The photographic image is the object itself, the object freed from the conditions of time and space that govern it.
>
> Andre Bazin[922]

The leap from "picture making" to photography was an event of profound cultural significance; it was, in Bazin's view "the most important event in the history of plastic arts."[923] It was, as well, the single most important event in the history of pornography: images of the human body could be captured and preserved in exact, vivid detail. As with every other visible activity, sex could now, by the miraculous power of the camera, be "freed from the conditions of time and space."

"Sex" in the abstract, of course, remains invisible to the camera; it is particular acts of sex between individual people which photographs, films, and video tapes can record. Unlike literature or drawing, sexually explicit photography cannot be made by one person: there must be a photographer and one or more persons being photographed. This use of an actual person as the object distinguishes such photography from all other types of sexual material. No study of filmed pornography can thus be complete without careful attention to the circumstances under which individual people decide to appear in it, and the effects of that appearance on their lives.

Nor is this an academic or trivial exercise. The evidence before us suggests that a substantial minority of women will some time in their lives be asked to pose for or perform sexually-explicit materials.[924] It appears, too, that proportion of women receiving such requests has increa steadily over the past several decades.[925] If our societ appetite for sexually-explicit material continues to grow, even if it remains at current levels, the decision whether have sex in front of a camera will confront thousands Americans.

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[922] The Ontology of the Photographic Image, in Classic Essays on Photography 237, 241 (A. Trachtenberg ed. 1980).

[923] Id. at 241.

After a brief clarification of terms, we begin examination of the issues surrounding pornographic "performanc by reviewing the extent to which those issues have been faced previous commissions and by the courts. We then turn to a br overview of the kinds and quality of available evidence on subject, and a summary of what that evidence shows.

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[924] Houston Hearing, Vol. I, Diana Russell, p. 288. Professor Russell's random survey of San Francisco wom fourteen percent stated that they had been asked to pose pornographic pictures. *Id*. at 285. The survey did not exam how many of these women actually posed for such pictures. national random survey of Canadians revealed that as many 60,000 people in that country had been used in pornography children, and perhaps an equal number as adults. *2 Sex Offenses Against Children, Report of the Comm. on Sexual Offen Against Children and Youths, Min. of Justice and Attorney Gene of Canada* 1198 (1984) (hereinafter the *Badgley Report*).

[925] Houston Hearing, Vol. I, Diana Russell, p. 2 (Younger women statistically are far more likely to have b asked to pose for pornography, with twenty-four percent of th aged twenty to twenty-four having been asked as against percent of those over sixty.) Because "pornographic pic [illegible] may not have been clearly defined in the questions included the survey, it is possible different generations of responde interpreted the query differently.

conclusion, we consider three areas which the record suggests should be of serious concern, along with recommendations for federal, state and local action.

## A. Background

1. Terminology and Distinctions. Those who appear in sexually-explicit material, from stills to movies to video tapes, have been variously called "actors," "models," "stars," and "sex workers" during the course of our public hearings. None of these terms seems perfectly appropriate as a description of what such activity involves: the first three seem euphemistic, the last derogatory. We adopt the term "model" not only because it seems to have been the one most commonly used during our hearings, but also because it seems to be somewhat less loaded with positive and negative connotations.[926]

It is important to qualify that definition instantly, however, by limiting its range of application to sexually-explicit material that is commercially produced. As we will discuss later, a substantial portion of photographic pornography is made informally, with little or no monetary motive and intention of widespread distribution. While such small-scal productions are of real concern to us, those who appear in the seem to be at least largely distinct from those who perform i glossier, commercial "X" rated material. Where it is importan in the following discussion to refer to those appearing i *non*commercial pornography, we will do so specifically. And wher we wish to refer *both* to those appearing in commercial an noncommercial pornography, we will simply use the ter "performers."

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[926] In choosing to use the terms "model" and "modeling" in this context we of course mean no disrespect to those engaged in conventional modeling - nor do we mean to imply that appearing as the subject of a sexually-explicit film is more similar to conventional modeling than it is, for example to conventional acting. See, C. Hix & M. Taylor, Male Model 181 (1979) ("The disapproval engendered by nude modeling spills over into the world of straight modeling, though to a lesser degree, merely because the root word 'model' is used in both cases. 'Model' is also a euphemism for an entirely different profession [prostitution].")

2. *Previous Commission Findings*. A fierce debate has rage in this country over obscenity and pornography since the 197 Commission on Obscenity and Pornography announced its findings; debate mirrored in the bitter internal struggles of th Commission itself.[927] It is perhaps a measure of the passionat as opposed to reflective character of the struggle that th interests of those persons actually photographed for sexually explicit material were considered by *neither* the majority nor th minority reports of the Commission. Perhaps because "hard-core material was seen by the Commissioners as being largely o foreign origin,[928] the risks for performers in such materials ma

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[927] For an overview of the tension between members of th 1970 Commission and problems in its operation, *See*, *Hill-Lin Minority Report* in *Report of the Commission on Obscenity an Pornography*, 456, 460-463 (1970) (hereinafter *1970 Report*).

[928] *1970 Report* at 22 (source of "picture magazines depicting sexual intercourse "principally Scandanavia"; "sta films" domestically produced but in "extremely disorganized fashion with no national distribution).

have seemed virtually irrelevant. The Commission's Traffic and Distribution Panel merely paused to note that in making a typical "stag film"[929] the 'performers' are paid $100 to $300.[930] The recommendation of the majority for repeal of all laws regulating distribution of obscene material to adults was premised on the belief "that there is no warrant for continued governmental interference with the full freedom of adults to read, obtain or view whatever such material they wish."[931]

The majority did not consider it even a theoretical possibility that such unlimited freedom might conflict with the freedom and well-being of those performing sexual acts in front of a camera for consumption by the masses.[932] So myopic was the Commission on this issue, indeed, that under the strict terms of its recommendations, neither "snuff" films[933] nor child pornography would have been subject to prohibition.[934]

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[929] "Stag films" were the only motion pictures on the market at the time of the Panel's report that met its definition of "hard core" or "under-the-counter" pornography - that is, "wholly photographic reproductions of actual sexual intercourse graphically depicting vaginal and/or oral penetration." Id. at 137.

[930] Id. at 140.

[931] Id. at 58.

[932] The dissenter, too, failed to perceive performers in sexually-explicit material as needing any special protection. See, Hill-Link Minority Report, supra note 927 at 457 (grounding dissent on need for "protection for public morality" rather than demonstrable individual "harms").

[933] A "snuff" film is one in which there is apparently an actual murder enacted.

Neither of the two major national committees which followed the 1970 Commission was quite so blind to the possible risks to performers in sexually-explicit material. Both the Williams Report[935] and the Fraser Report[936] recommended prohibition of pornographic materials which depicted a child[937] in explicit sexual conduct or which were made in such a manner that "physical injury" was inflicted upon a performer. Yet apart from their concern for protecting children from use in pornography, the Williams and Fraser Committees ultimately gave little attention to the circumstances in which sexually-explicit material is produced, and in particular the situation of those who perform in it. The Williams Committee heard some evidence that "there was much misery in the trade and that many of the girls in strip clubs, for example, were disturbed and mentally ill," but did not think it sufficient in the face of vigorous denials from a publisher of magazines "within the trade."[938] Its analysis of the issue did not extend beyond two paragraphs, and focused solely on production of pornography in Great Britain, which at the time did not generally permit production of any "hard core" pornography.[939] The Fraser Committee gave the issue even more cursory treatment after finding that only "a very small number of [sexually-explicit] films are produced within Canada" and "the production of other forms of pornography, for example, magazines and books is not undertaken for commercial purposes."[940] The Committee supported a ban on material in which "actual physical harm was caused to the person or persons depicted" as an "additional deterrent to the causing of such harm."[941] Without discussing the nature of the evidence before it, the Committee declared that "we know that the relations between the producers of violent pornography and the actors in it are often such that there is little or no respect for the rights and physical welfare of the latter."[942] Like the Williams Report, however, the

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[934] To prevent production of child pornography the majority apparently relied on the "taboo against pedophilia" which made the "use of pre-pubescent children in stag films . . . almost nonexistent." 1970 Report at 139. The 1970 Commission expressed no concern whatsoever over the possible use of young adolescents in pornography.

[935] B. Williams, Report of the Commission on Obscenity and Film Censorship 131 (1979) (hereinafter the Williams Report).

[936] P. Fraser, Pornography and Prostitution in Canada: Report of the Special Comm. on Pornography and Prostitution 272-79, 629-632(1984) (hereinafter the Fraser Report).

[937] The Williams Committee set the age limit for protection of children in this area at sixteen, Williams Report at 131; the Fraser Committee chose eighteen instead. Fraser Report at 627-28.

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[938] Williams Report at 91.

[939] Id. at 37. "Foreign" material was the chief target of British obscenity-law enforcement in the late 1970's, Id., and within Britain the "industry" had agreed to restrain itself through self-regulation. Id. at 42.

[940] Fraser Report at 87. This abrupt dismissal of the problem of pornography production in Canada is in curious tension with the finding of the Badgley Report that tens of thousands of Canadians have at one time or other been "subjects of sexually explicit depictions." Badgley Report, supra note 924, at 1198.

[941] Id. at 265.

[942] Id.

Canadian report did not explain what level of proof would be required to demonstrate that "actual" as opposed to "simulated" harm had been caused to performers. Unlike the Williams Report, however, the Fraser Report did not devote even a paragraph to consideration of harms to performers other than those resulting from outright violence on the set.[943]

Ultimately, then, it seems fair to say that in this area, at least, we are without clear guidance from our predecessors in examining a possible "harm" of pornography. The nature of the pornography industry has changed so rapidly in this country since the 1960's that it is hardly surprising that the 1970 Commission felt no obligation to examine the situation of performers; because the industry seems so centered in the United States and continental Europe, moreover, it would have been extremely difficult for the Canadian or British panels to study it in detail. Nevertheless, the failure of these commissions to examine the issue even in the abstract points to what we view as a nagging conceptual flaw in their approaches: they assumed a photographic image of sexual conduct by actual persons to be essentially no different from a written description or drawing of such conduct. As we will explain below, the use and misuse of "models" and other performers makes that assumption at least gravely doubtful.

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[943] The Report's only reference to possible "harms" of pornography which might be associated with effects on performers was its recitation of the allegation by some "that pornography is to be deplored simply for portraying people in an inhuman way . . . ." Id. at 96. Even in that context, however, the Report immediately tested the allegation with reference only to the effects of such portrayals on viewers. Id.

3. Performers and Obscenity Law. The refusal of previous commissions to consider carefully the situation of performers in sexually-explicit material is hardly unique in this area; indeed, it is a characteristic of virtually all legal analysis of "pornography" until very recently. In this country, of course, the Supreme Court did not squarely address the constitutional issues inherent in suppression of obscenity until the Roth decision in 1957.[944] There the Court rested its view that obscene material could constitutionally be suppressed on the failure of such material to have "even the slightest redeeming social importance,"[945] and made no distinctions in its analysis among writings, drawings, or photographs.[946] During the following sixteen years of acrimonious judicial debate over the problem of "obscenity" the Court singled out "photographic speech" for special analysis only twice: in Times Film Corp. v. Chicago[947] and Freedman v. Maryland[948] it laid out rules

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[944] Roth v. United States, 354 U.S. 476(1957).

[945] Id. at 484 (emphasis added).

[946] Indeed, the Court was strongly criticized by Justice Harlan in his separate opinion for refusing to examine the materials at issue and make "particularized judgments" on the "individual constitutional problem" presented by each of them. Id. at 497.

[947] 365 U.S. 43(1961). In Bantam Books v. Sullivan, 372 U.S. 58, 70 n. 10(1963), the Court distinguished a system of "prior restraint" affecting books from one affecting movies without explaining relevant differences in the character of each mode of speech.

[948] 380 U.S. 649(1965).

governing prior review and censorship of motion pictures. Yet in those decisions, the Court's "recognition that films differ from other forms of expression"[949] seemed in no way based on dangers to performers but rather on a largely unexplained concern for the special power of films to corrupt viewers.[950] When in 1973 the Court finally settled on the test and the rationale for regulation of obscenity in, respectively, Miller v. California[951] and Paris Adult Theatre v. Slaton,[952] photographic speech was not discussed separately and possible risks or harms to performers in sexually-explicit films were not mentioned.[953] The decision of the Court on that same day that "words alone" could be suppressed if obscene reinforced implicitly the assumption that constitutional doctrine governing sexually-explicit material was based solely on its effects on viewers and the public.[954]

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[949] Freedman v. Maryland, supra, 380 U.S. at 61. The initial indication by the Court that motion pictures might present a "peculiar problem" came in its first decision holding films to be constitutionally protected "speech." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952).

[950] In Times Film Corp., the Court referred only to Chicago's "duty to protect its people from the dangers of obscenity in the public exhibition of motion pictures" as a basis for distinguishing films from other modes of expression. Id. at 49. In Freedman the Court muddied its references to the distinctive qualities of films by ultimately suggesting that Maryland look for guidance to a previously approved prior censorship scheme for books (in Kingsley Books, Inc., v. Brown, 354 U.S. 436 (1957). 380 U.S. at 60.

[951] 413 U.S. 15(1973).

[952] 413 U.S. 49(1973).

[953] The Court explained in Paris Adult Theatre that suppression of obscenity by the States could be justified by the conclusion that "public exhibition of obscene material, or commerce in such material has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' "right to maintain a decent society'." 413 U.S. at 69.

With minor exceptions[955] that assumption continued to govern judicial pronouncements on sexually-explicit material until the Supreme Court decided New York v. Ferber[956] in 1982. There the Court for the first time extended its analysis of such material to encompass the "privacy interests" of the performers[957] - in this case children. Filming children in the midst of explicit sexual activity not only harmed them because of the sexual abuse involved, but also because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[958] In addition, the continued existence of a market for such materials was found to make it more likely that children would be abused in the future thus justifying a ban on distribution as the "most expeditious if not the only practical method of law enforcement . . . ."[959]

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[954] Kaplan v. California, 413 U.S. 115(1973). In that decision the Court distinguished between "traditional and emotional response" to suppression of words and the tepid defense mounted on behalf of "obscene pictures of flagrant human conduct." 413 U.S. 119.

[955] See, Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (cartoon depiction of famous boxer in the nude was held actionable because of its effects on him). In Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562(1977) the Court held that a circus performer's "right of publicity" in his act could, consistent with First Amendment, receive protection under state tort law.

[956] 458 U.S. 747(1982).

[957] Id. at 759 n. 10.

[958] Id. at 759. Circulation of the pornography was found by the Court to violate "the individual interest in avoiding disclosure of personal matters." Id. at 759 n. 10 (citing Whalen v. Roe, 429 U.S. 589(1977)).

Since *Ferber*, courts have begun to consider problems faced by performers in pornography, including adults as well as children. The Fifth Circuit recently upheld a judgment against *Chic* magazine for publishing a nude picture of a woman whose consent had been obtained fraudulently.[960] The same court sustained a judgment against *Hustler* magazine for "reckless" publication of a nude photograph which had been stolen from the subject's home.[961] And in overturning the "Indianapolis Ordinance" - which sought to provide civil remedies against pornography as a form of sex discrimination - the Seventh Circuit declared that "without question a state may prohibit fraud, trickery, or the use of force to induce people to perform in pornographic or in any other films,"[962] and that under the principles of *Ferber* the state might be able to "restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct."[963]

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[959] *Id*. at 760.

[960] *Braun v. Flynt*, 726 F. 2d 245 (1984), *cert*. *denied*, 105 S. Ct. 783(1984).

[961] *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084(1984), *cert*. *denied*, 105 S. Ct. 783(1985). *Accord*, *Hustler Magazine, Inc. v. Douglass*, 769 F.2d 1128(7th Cir. 1985), *cert*. *denied*, 54 U.S.L.W. 3646(Mar. 31, 1986).

[962] *American Booksellers Assn. v. Hudnut*, 771 F. 2d 323, 332(1985), *aff'd mem.*, 54 U.S.L.W. 3560 (Feb. 24, 1986).

In the wake of the Ferber decision, then, it is still difficult to predict the precise constitutional boundaries which govern regulation of photographic "speech" on behalf of performers.[964] That such performers have privacy and other interests worthy of protection, however, now seems clear. In part as a response to these judicial developments and in part as an effort to aid in future legal analysis, we feel compelled to examine with the utmost care the evidence bearing on the situation of performers used in pornographic photographs, video tapes, and films.

## B. Use of Performers in Pornography -- the Evidence

Because no previous commission has fully examined the special problems presented by the use of actual persons to make sexually-explicit material, and because courts have only begun to develop the legal principles which may be applied to resolving those problems, we approach this aspect of our task with extreme caution. To begin with, we comment on the nature and the quality of the evidence before us both in testimony at our hearings and on the public record elsewhere. Then we examine the main outlines of what that evidence reveals about the nature of the performers' reasons for participation in producing pornography, and their experiences once the decision has been made.

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[963] Id. But cf., Faloona v. Hustler Magazine, 607 F. Supp. 1341 (D.C. Tex. 1985), appeal docketed, No. 85-1359 (5th Cir. 1985) (children whose nude pictures, including one showing the plaintiff child holding her vagina open facing the camera, Hustler 33(Nov. 1978), appeared in adult magazine had no right to revoke mother's consent to publication).

[964] For an indication of the confusion still remaining compare Braun v. Flynt, supra note 960, with Faloona v. Hustler Magazine, supra note 963. Deference to the parent's "consent" to publication of the nude pictures in the Faloona case is difficult to justify in view of their graphic character, See, note 963 supra, which makes them at least arguably prohibited "child pornography" under state and federal law. But see, Faloona, supra, 607 F. Supp. at 1343 n. 4 (denying that the pictures constitute child pornography despite inclusion in federal statute of prohibitions directed at "lewd exhibition of the genitals" of children 18 U.S.C. S2255(2) (D) (1984).

1. The Nature of the Evidence. In setting forth the types of evidence we have considered on this subject, it is important to note first the limitations which have been imposed on our fact-finding efforts. Above all, we have not had the power to issue subpoenas summoning reluctant witnesses to appear; thus all information at our disposal was presented to us voluntarily or obtained through our review of materials on the public record. In addition, the severe time constraints imposed on our work were particularly damaging in this area because, as discussed earlier, this aspect of the pornography "industry" has received only the scantiest attention in the past. We, therefore, did not have the benefit of knowing from the outset what were the most likely avenues to discovery of pertinent evidence about activities that are largely underground. Finally, both the difficulty of locating witnesses and the pressure of time meant that we were not able to spend substantial time in cross-examination of their testimony or in background investigations to corroborate their

statements.

Caution is dictated, too, because there have been to our knowledge almost no "scientific" investigations into the background of participants in pornography or its effects on them afterwards.[965] Such investigations would certainly be extremely difficult - perhaps impossible - to design and conduct given the clandestine character of the pornography industry. Reliable conclusions about the number and characteristics of performers in pornography will likely remain as difficult to reach as, for example, solid estimates of the number and characteristics of illegal aliens.966

What we have been able to discover, however, is deeply disturbing, and, we think, based on substantial evidence from a variety of generally credible sources. Somewhat to our surprise, the testimony of law enforcement officers, of current and former performers in pornography, and of those involved with pornography "behind the scenes" has rarely been in conflict. Further, significant and useful information is available from court cases, from books and "adult" magazines, and from "adult" film industry publications. If on the whole we believe our understanding of the problems faced by performers in pornography is incomplete, and that our findings and recommendations must be largely tentative, we also view the state of the evidence as highly suggestive. And we think it points to the need for action as well as for further study.

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[965] The survey Diana Russell conducted is the only American survey addressing the issue that we have seen. Houston Hearing, Vol. I, Diana Russell, p. 283. See, Badgley Report, supra note 924, addressing the issue in Canada.

[966] See, e.g., United States General Accounting Office, Problems and Options in Estimating the Size of the Illegal Alien Population, Report to the Chmn. of the Subcomm. on Immigration and Refugee Policy of the Comm. on the Judiciary, United States Senate (1982) ("Current estimates of the size of the illegal alien population in the United States are unsatisfactory and it seems unlikely that more precise estimates can be derived soon." Id. at 19.)

2. The Performers. The most basic questions about performers in pornography - who they are, and how they came to appear in sexually-explicit material - are unfortunately the most difficult to answer decisively. For reasons that are largely obvious but will be explored later, anonymity is a valued commodity among pornography performers: apparently even the best known models frequently do not use their real names for their appearances.[967] And in much pornography (such as that shown in video arcades) the performers are not identified at all. Thus it would have been difficult to conduct independent investigations of their backgrounds even if resources permitted it; instead we have relied on testimony and other information in the public record. What that evidence shows about their age range, background, motivations, and path of entry into modeling is a

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[967] Models (particularly women) tend to choose short, suggestive names: Linda Lovelace, Desiree Lane, Ali Moore, Dick Rambone. The majority of the witnesses appearing before us who said they had appeared in sexually-explicit material testified under truncated or fictitious names. The use of assumed names seems to be rooted in far more than the longstanding theatrical practice of giving upcoming actors new names for "box office" reasons - rather it appears to be closely related to the models' need to conceal their involvement from their families, friends, and future employers.

crucial backdrop to examination of what the sex industry demands of them.

a. Age. Perhaps the single most common feature of models is their relative, and in the vast majority of cases, absolute youth. As one law enforcement officer who has extensively investigated the production of commercial pornography told us, "they [the producers] are looking for models that look as young as possible. They may use an eighteen-year-old model and dress her up to look like she is 15."[968] Female models appearing in "mainstream" commercial pornography appear rarely to be over thirty years old or even in their late twenties; indeed, most whose age we have been able to gauge began their careers in their late teens.[969] Indeed, one former model who now works in the front office of an "adult" video company explained her decision to retire thus: "Good roles for women over nineteen years old have become few and far between."[970] William Margold, a leading figure in the "adult" film industry, described it simply as "essentially an overage juvenile hall."[971] While male models apparently can enter and remain in the industry at a somewhat older age,[972] on the whole we find Mr. Margold's imagery particularly apt.[973]

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[968] Los Angeles Hearing, Vol. I, William Roberts, p. 64-65. This emphasis on youth apparently took hold in hard-core sex films in the years after World War II. Before then models who appeared in what were at that time know as "stag films" were in their late twenties or early thirties. Sampson, Commercial Traffic in Sexually Oriented Materials in the United States in 3 Technical Report of the Commission on Obscenity and Pornography 1, 186(1971).

[969] The ages at which some prominent "X" rated film models apparently began performing are, so far as we can determine from materials on the public record, as follows: Angel (18); Ali Moore (18); Amber Lynn (19); Jessie St. James (18 or 19); Mindy Rae (19); Shauna Grant (18); Tiffany Clark (18); Nikki Charm (18); Ginger Lynn (19 or 20); Richard Pacheco (20 or 21); Seka (24); Samantha Fox (28); Chelsea Black ("fortyish"). The ages listed above are largely taken from articles or interviews published in adult film industry trade publications or in commercial, sexually-explicit "guides" to adult films and videos. As a result, it is possible that models or interviewers understated their ages to maintain a desireable public image. Nevertheless, in 1971 Sampson, supra, note 968 found that "[m]any current female performers appear to be in their late teens or early twenties." Id. at 186. Further, about half of our witnesses who had appeared in sexually-explicit films or photos

b. Personal Background. Along with their youth, models in sexually-explicit media seem to share troubled or at least ambivalent personal backgrounds. Although many described or implied unhappy experiences during childhood, we are not able to say with scientific certainty whether their family backgrounds

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began such performing in their teens: Lisa (Washington, D.C.); Jeff (Washington, D.C.); George (Los Angeles); Chris (Los Angeles); Harry James (Miami); and Linda Marchiano (New York). See also, Lederer, Then and Now: An Interview with a Former Pornography Model, in Take Back the Night: Women on Pornography, 57,58 (began nude modeling immediately after graduation from high school) (hereinafter "Lederer Interview"); People v. Fixler, 128 Cal. Rptr. 363(Ct. App. 2d Dist. 1976) (use of fourteen-year-old model by large scale commercial publisher of sexually-explicit magazines).

[970] Where Are They Now?, Adult Video News 52(Aug. 1985).

[971] Los Angeles Hearing, Vol. I, William Margold, p. 411.

[972] Bennett, Breaking into X-Rated Films, A Guide for Prospective Porn Stars, Hustler Erotic Video Guide 71(May 1986) (Interview with William Margold).

[973] See, Interview: Cecil Howard, Adult Video News 1 (October 1984) (interview with prominent "adult film" producer) ("AVN: Does it appear to you that we're now seeing younger and younger girls doing films? CH: It's true and I think that's horrible." Id. at 24.)

were worse or better than "normal."[974] One model recently declared before a Senate subcommittee that it is a "myth" that models have "unhappy childhoods."[975]

Despite this claim, many other models have painted a drastically different picture of their families - broken marriages,[976] early parental death,[977] and intense family conflict.[978] Many - including the model who denied the "myth" of unhappy childhoods reported having suffered early sexual abuse.[979] Professor Russell, moreover, has found a "highly statistically significant relationship between incestuous abuse and being asked to pose for pornography."[980] In her study she found that "girls and women who are being asked to pose for pornography . . . are those who have already been seriously sexually abused by a relative."[981] Sketchy as the evidence is, we are struck by the relative rarity in the material and testimony we have studied of claims regarding positive features of families of models.[982] If anything, the balance of the evidence suggests that models have typically grown up in

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[974] Thus Professor Russell in her study found no significant difference in measures of "social class" between women who were asked to pose for pornography and those who were not. Houston Hearing, Vol. I, Diana Russell. Unfortunately, her study did not determine which respondents had actually agreed to pose, so provides only suggestive evidence regarding that subgroup.

[975] *Effect of Pornography on Women, Children, Hearings* before the *Subcomm. on Juvenile Justice, Comm. on the Judiciary, U.S. Senate, 98th Cong., 2d Sess.* 315 (1984) (Statement of Veronica Vera) ("I came from a very loving family. That core of love has always been my strength.") (hereinafter cited as *1984 Senate Hearing*.)

[976] Statement of Valerie Heller (Washington, D.C.); Lisa (Washington, D.C.); Jeff (Washington, D.C.); *Getting Down with Candida Royale* Forum 42, 45 (April 1986); *From Cheerleader to Smut Star*, Adult Video 8, 9 (April 1986) (interview with Ali Moore) (hereinafter "Ali Moore Interview"); *Christy Canyon*, Best of Erotic X-Rated Film Guide 24(no.8).

[977] *Amber Lynn: Porn's Busiest Beaver*, Hustler 24, 30 (April 1986).

[978] *1984 Senate Hearing*, *supra* note 975, at 1064. (Testimony of Linda Marchiano).

[979] Vera, "Beyond Kink," *Puritan*, copy of article submitted with letter of V. Vera dated February 8, 1986, to Commission (abuse by Stranger); Statement of Jeff (Washington, D.C.) (babysitter); Lisa (Washington, D.C.) (uncle); Valerie Heller (Washington) (stepfather and stepbrothers); Lederer

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interview, supra note 969, at 57-58; *See also*, Statement of George (Los Angeles) (exposure by father to hard core pornography during childhood and early teens, considered by witness to have been major contributing influence in decision to perform in such material). *Joanna Storm*, X-Rated Cinema 63(May 1986) ("I was a real little nympho until I was about eighteen. I got tired of every man and his brother making a pass at me."); *Interview with Lynn Ann Wilson*, Adult Cinema 64(Vol. 5, No. 2) (1986) (". . . any orgies that even went on were while I was living at home. At the tender age of 16." *Id*. at 68.); Ali Moore Interview, *supra* note 976, at 54 ("I had a rough childhood. Some things I'd rather not discuss, and it left me kind of gun shy when it comes to sex.")

[980] Houston Hearing, Vol. I, Diana Russell, p. 310I.

[981] *Id*. at 310M. In Professor Russell's view, men seeking to make pornography are adept at selecting previously victimized women. *Id*.

[982] Of the models who testified before us, or otherwise have discussed their past publicly, only a handful even refer to their families except to describe such problems as divorce, conflict, or abuse. *Compare*, Statement of Dottie Meyer ("My parents raised me in a happy, healthy home"); and testimony of Veronica Vera, *supra* note 975; *with* text to notes 976-979. Many, however, have given interviews or testimony without any reference at all to their families; thus we do not know what they would say about their upbringing. That so high a number were involved with explicit sex modeling by their late teens certainly does not suggest to us that their silence should be construed as evidence of a happy childhood and adolescence. *See* note 979 *supra*.

circumstances of parental deprivation, abuse, or both.[983]

c. Economic Circumstances. If it is not possible to speak with certainty about the family backgrounds of the young women and men who become "models," it nevertheless seems clear what chiefly motivates their decision to appear in sexually-explicit material: financial need. As one former model put it when asked why most women enter nude modeling:

> A lot of women are hurt or crazy women under stress. Yes, most women come in under a lot of stress. They're usually desperate when they first come in - maybe they need money for some emergency, like I did, or they've gone as long as they can doing odds and ends or working at (menial) jobs, and they finally just have to pay their bills. I met a woman whose kid was in the hospital, and I met lots of women who were financially strapped. There were also many illegal aliens there who couldn't work regular jobs even if they had the skills because they didn't have their green cards . . . [T]hey certainly know how to get you to do what they want. Some women are so bad off that they just go immediately into hard-core films.[984]

One prominent model recently described her entry into the business in similar though less sympathetic terms.

> I had a sugar daddy who was, you know, keeping me. Paying for everything. I didn't need a dime of my own and never had to work. Then I guess his wife found

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[983] We note as well the similarity of the backgrounds of many of these models to those of prostitutes. See, e.g., Silbert & Pines, Early Sexual Exploitation as an Influence in Prostitution, 28 Social Work 285(1983) (in sample of 200 current and former female prostitutes 60 per cent had been sexually abused as juveniles); Silbert & Pines, Entrance into Prostitution, 13 Youth & Society 471(1982) (in same sample only half came from two-parent homes, Id. at 475; only nineteen per cent and thirty-two percent had a "positive relationship" with, respectively, their fathers and their mothers. Id. at 480.

[984] Lederer Interview, supra note 969, at 58-59.

> out, and he ran back to her, breaking it off with me. I was out in the cold. Then a friend of his asked me if I was interested in doing some masturbation stuff on video. I needed the money and said okay.[985]

Although not a universal feature of models' accounts,[986] with striking regularity they speak of money and dire financial need as critical factors in their decision to model.[987] In the words of one now famous former model who was "literally starving" when he made an X-rated film: "It was either do that movie or rob someone."[988] As a representative of United States Prostitutes Collective put it: "For women working in the sex industry, prostitution and pornography are about money, not sex."[989] Not surprisingly, Professor Russell found that women who had been asked to appear in pornography were significantly poorer than other women in her sample.[990] From what we have learned about the rigors and risks of sex modeling, it is difficult to imagine any overriding motive other than serious economic need for such a momentous decision.[991]

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[985] *Amber Lynn: Porn's Busiest Beaver*, Hustler 24, 30(April 1986).

[986] *See*, *Interview - Richard Pacheco*, Adult Video News 1 (1984) (made his first "X" rated film in 1968 at age twenty or twenty-one because "I wanted to know what it was like." *Id.* at 22). Some other models do not clearly refer to financial motivation as a factor in their career decision. Thus Veronica Vera described to a Senate Subcommittee in 1984 then decided, four years before the hearing, to "write or forget my fantasy to become a writer" and finally to enter "X" rated films. Ms. Vera's 1984 testimony represents the only statement by a current or former model of which we are aware which seems flatly to contradict the assertion that financial need is the overriding reason for entering nude modeling; unfortunately, it not only gives no verifiable details of her previous career but also seems at least partially inconsistent with some of her published statements. *See*, Vera, *Beyond Kink*, *supra* note 975 (describing (1) how, in 1979, she lived in Paris with "Roger" and, in 1980 how (2) "Mistress Antoinette" placed her "in beautiful bondage" on a tree from which she was "bound and suspended" while "(h)er husband silently (took) pictures.").

[987] *See*, *e.g.*, *Heather Wayne*, Erotic X-Film Guide 28 (May 1986) (former model, "What was I gonna do when the money stopped coming in? I couldn't live. I couldn't survive, because it was the money that kept me going." *Id.* at 58); *Ali Moore Interview*, *supra* note 976, at 9 ("Adult Video: . . . Why do you do it? Ali: Money, money, money. That is the only reason in the world."); Statement of "Lisa" ("The money [offered for nude modeling] wasn't all that great but I was on welfare . . ."); *Interview: Harry Reems*, Adult Video News (April 1985) ("I was making a whopping $76.00 per week [as a New York actor]. I needed to supplement my income."); letter from Kellie Everts to United States Department of Justice of March 21, 1986 [former stripper and nude model] stating "the women who get involved in pornography do so not because of a lack of *morals* but because of *economic* necessity"); *Candida Royale Interview*, *supra* note 976,

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at 46 ("Then one summer, it all fell apart . . . I had no support. I got a job in a porn film and thought, why not?"); C. Hix, Male Model 165-86 (among males involved in nude modeling the phrase "At the time, I needed the money" is the "usual explanation" for their initial involvement. Id. at 179.) Some models, of course, may well have been coerced into appearing in sexually-explicit material, See Section B-3-b, infra; for them money could not be a factor in their participation.

[988] Sylvester Stallone, Playgirl 39 (October 1985).

[989] Los Angeles Hearing, Vol. II, Margaret Prescod, p. 216. Ms. Prescod pointed out, as did numerous other witnesses, that the "feminization of poverty" had left the sex industry as "one of the few alternatives open to women to get out of, or refuse poverty . . . ." Id. at 216.

[990] Houston Hearing, Vol. I, Diana Russell, p. 310F.

[991] One alternative motive advanced by a major male model (Jack Wrangler) is intriguing: "I was so insecure with [my body] that I wanted to build myself into something that everyone would say was beautiful whether I believed it or not." Male Model, supra note 926, at 183. Obviously the decision to enter sex modeling is an extremely complex one that involves far more than mere economic need. It is likely, for example, that childhood sexual abuse plays a substantial role in predisposing individuals to consider such activity. See, text to notes 974-983, supra. Research on the factors influencing such a decision is clearly

3. The Job. When that decision is made, and for whatever reason, the model enters a world averse to public scrutiny and almost wholly unconcerned with public accountability. In our own examination of the commercial "adult" film and magazine industries we received little information from the industries themselves regarding the position of performers, although we did find at least one industry spokesman, William Margold, remarkably candid and forthright on the subject. Fortunately, a substantial amount of information in this area is available from knowledgeable law enforcement sources, court cases, and, of course, performers themselves. The view of performers' lives which they provide is invaluable and grimly fascinating from the methods of recruitment to the experience of performing to the likely aftermath in personal career directions.

a. Recruitment. For most young women in commercial pornography, entry into "modeling" seems to occur almost without serious thought. One now famous model described her own initiation in surprisingly casual terms:

> Well, I answered an ad in the paper. It was for a modeling job. It did not say, "adult modeling," or "nude modeling" or anything such as that. I went in and it turned out to be nude modeling. The first day, I took shots for *Penthouse*. So I kept on going and before I knew it, three months later I was doing adult

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needed - yet it does seem clear that what the models themselves *say* when asked about their motives is that financial need was paramount. Even Mr. Wrangler, when asked why "most" men go into nude modeling replied: "One, because they need some bucks and somebody offers them a hundred bucks or so if they will pose nude for them. The same reason some people might end up in prostitution." *Id*. at 186.

films.[992]

Typically young women and men answer advertisements seeking "models," and only later discover nudity or sexual intercourse is involved in the work.[993] Often, the "model agencies" placing the ads apply strong pressure to convince prospects, as one former model has recently described it:

> The majority of people in this business, they're heartless. They take a little girl off the street, fresh out of high school. They sit there and keep pushing it in her face and asking her if she'd like to do porn, and she keeps saying "No" and "No" and they keep on pressing . . . .[994]

Others enter from nude dancing[995] or prostitution.[996]

Whatever their entry route, however, well established, profitable enterprises exist to provide the services of female models to producers of "X" rated material.[997] "Model agents" receive a flat daily fee for each model provided, and provide producers with books containing pictures of those models available.[998] One such agent, William Margold, described to us the "legitimate ad" he regularly places in a Hollywood publication that, in his words, "lures, literally lures people in on the guise of getting [a legitimate acting] job."[999] After they arrive at his office, Mr. Margold tells the prospects, who "are all filled with the idea of becoming a star," what his agency actually wants, and then warns them of the hazards of sex modeling.[1000] "Many people," he continued, "years later, would call and thank me for not letting them into the industry, because I would warn them out. I didn't need that on my conscience."[1001] In view of the overall tactics employed by him and other agents, Mr. Margold's "conscience" on this point seems somewhat overnice.

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[992] Interview: Ginger Lynn, Adult Video News 30 (Feb. 1985).

[993] See, e.g., Los Angeles Hearing, Vol. I, Chris, p. 92; Los Angeles Hearing, Vol. II, Charles Sullivan, p. 65; Los Angeles Hearing, Vol. II, Chatherine Goodwin, p. 78-79.

[994] Heather Wayne Interview, supra note 987, at 30. See, Los Angeles Hearing, Vol. II, Catherine Goodwin, 78-79 (after adolescent had posed for "fashion/glamour" photos, photographer "began to persuade and coerce her to do the S&M type of posing . . . .").

[995] Washington, D.C., Hearing, Vol. I, Lisa, p. 61. (nude dancing at age sixteen, then "modeling" at eighteen); Joanna Storm Interview, supra note 979, 60-61 (nude dancing and stripping at age sixteen, "film career" at age twenty).

[996] Chicago Hearing, Vol. II, Terese Stanton.

With regard to men involved in "modeling," by contrast, recruitment practices seem far more straightforward. Males have a substantially more difficult time breaking into pornographic modeling; where men are concerned, according to Mr. Margold, "[t]his is a closed shop" with only a few "superstars" who "end up in all the videos."[1002] Those who are able to enter the business often do so through the good offices of a new or established female performer.[1003] Some male models, on the other hand, drift into pornography in ways similar to women - through nude dancing, prostitution, or clever persuasion.[1004] Recruitment of men may be easier because of what many male performers describe as the ego gratification of working in pornography.[1005]

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[997] See, People v. Souter, 178 Cal. Rptr. 111(Ct. App., 2d Dist., 1981) (pandering conviction of principal of World Modeling Agency, which provided performers for commercial pornography productions); People ex rel. Van DeKamp v. American Art Enterprises, Inc.; 142 Cal. Rptr. 338(Ct. App., operation which engaged its performers through "model agencies" Id. at 340).

[998] Los Angeles Hearing, Vol. I, William Roberts, p. 64.

[999] Los Angeles Hearing, Vol. I, William Margold, p. 402-03.

[1000] Id. at 402.

[1001] Id.

b. *Coercion*. Efficient as it is, the normal recruiting process for pornographic models is apparently not fully adequate to meet producers' needs. It is an unpleasant, controversial, but in our view well established fact, that at least some performers have been physically coerced into appearing in sexually-explicit material, while others have been forced to engage in sexual activity during performances that they had not agreed to beforehand. We heard direct testimony from three unrelated women who each described how brutal force was used to push her into pornography.[1006] The credibility of that testimony was strongly reinforced by the testimony of representatives of "sex workers,"[1007] by a victim counselling agency;[1008] and extrinsic evidence on the public record.[1009]

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[1002] Bennett, *Breaking into "X" Rated Films*, Hustler Erotic Video Guide 71 (May 1986) (interview with William Margold). In this article Mr. Margold seemed to be referring to heterosexual male modeling. With regard to modeling in *homosexual* publications and films, there appears to be a much broader demand for new and different faces. *See generally*, *Male Model*, *supra* note 926, at 172-86.

[1003] *Id.* at 72. *See*, *Porn Star Confessions*, Erotic X-Film Guide 51, 60 (May 1986) (story of Marc Wallice, introduced into "Swedish Erotica" through Lisa DeLeeuw, established model).

[1004] Los Angeles Hearing, Vol. I, George, p. 86. ("dancing and nude modeling"); Washington, D.C., Hearing, Vol. I, Jeff, p. 168 (prostitution); *Male Model*, *supra* note 926, at 176-77 (interview with "John Rucculo" describing gentle persuasion into nude modeling).

[1005] *See*, *Male Model*, *supra* note 926, at 182-86 (comments of Jack Wrangler, whose "reward" is principally "self-esteem" *Id.* at 182.). *But see*, Richard Pacheco Interview, *supra* note 986, at 24 ("AVN: *But how* much of it do you like? RP: 15% is pleasure and 85% is trauma and hard work for which I'm very well paid.").

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[1006] *See*, *generally*, Washington, D.C., Hearing, Vol. I, Valerie Heller, p. 217; Washington, D.C., Hearing, Vol. I, Sarah Wynter, p. 175; New York Hearing, Vol,. I, Linda Marchiano, p. 47; Ms. Marchiano's testimony was actually a short summary of her full account in L. Lovelace, *Ordeal* (1980), in which she described her forced introduction and participation in pornography by her husband and "manager" Chuck Traynor. Mr. Margold discounted her testimony on the basis that "if you put a gun to the head of the girl who's performing fellatio on you, what would be left to perform fellatio on." Los Angeles Hearing, Vol. I, William Margold, p. 414. This view is neither faithful to the actual account of Ms. Marchiano's experiences nor convincing in its logic. Harry Reems, who performed with Ms. Marchiano in "Deep Throat," has more cogently questioned the validity of her assertions by contradicting certain details of her account of the filming of that movie. Harry Reems Interview, *supra* note 987, at 28. Nevertheless he ultimately conceded that he does not know whether Ms. Marchiano was coerced into making "Deep Throat" or other movies, *Id.*, and at least one impartial chronicler of the world in which she moved during the 1970s has apparently found her story fully credible. R. Miller, *Bunny: The Real Story of Playboy* 162-66(1984). Based on their demeanor, their lack of any obvious motive to falsify, and the other evidence we have heard, we can state that we believe the testimony of Ms. Marchiano, Ms. Heller, and Ms. Wynter to be true, and , in view of their sufferings from continued public exposure in this light, courageous as well.

[1007] Los Angeles Hearing, Vol. II, Priscilla Alexander, p. 229. (Education Coordinator, COYOTE, National Task Force on Prostitution) ("There is certainly evidence that some women have been forced to perform in sexually-explicit productions." *Id.* at 229-30.)

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[1008] Chicago Hearing, Vol. II, Terese Stanton, (founding member of Pornography Resource Center which provides help to victims of pornography) ("We have gotten calls from both women and men who are currently being forced into the making of pornography - asking us if there is anything we can do for them." *Id.* at 6.)

[1009] In hearings before the Minneapolis City Council in 1983, one woman related how she was forced into pornographic performance. *Public Hrgs. on Ordinance to Add Pornography As Discrimination Against Women* (1983), Session II at 49-52. In those same hearings Professor Kathleen Barry, author of *Female Sexual Slavery* (1984) submitted al letter describing how some pornography is produced by pimps through the rape of prostitutes, for reasons which "include personal pleasure of the pimp and his friends, blackmailing the victim by threatening to send them to her family, and selling to the pornographers for mass production." *Id.*, Session I at 58-59. A street outreach worker confirmed that young prostitutes are often raped by their pimps, with the rapes photographed, held as a weapon to insure their continued submission, and later "published in pornographic magazines without their knowledge and consent." *Id.* Session III, at 77. Because pornography and prostitution are so strongly linked, it may of course be inferred that the coercion which historically and currently afflicts the latter will play some role in the former. *See*, R. Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (about 7.5 per cent of prostitutes at the turn of the century were physically coerced into the profession); Silbert & Pines, *Entrance into Prostitution*, *supra* note 987, at 484 (four per cent of present-day sample of prostitutes listed "physical threat" as the "major reason" they entered prostitution); *Badgley Report*, *supra* note 1013, at 988 (3.6 per cent of juvenile male prostitutes and 15.9 per cent of juvenile female prostitutes were forced into prostitution). Finally, although it has not yet come to trial, we note that a state court in New Mexico has received substantial testimony supporting the existence of a pornography ring which kidnapped a young woman for use in a pornographic film but killed her out of fear of discovery - testimony sufficient for the court to find probable cause and bind the suspects over for trial. *See*, series of articles from Albuquerque *Journal* and *Tribune*, beginning February 15, 1986, on file in Commission Archives. Whether or not a conviction for murder is obtained in that case, we believe the evidence is sufficient to strongly indicate that forcible tactics were used to secure female models for pornography. *See also*, Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 Harv. Women's L.J. 5, 20-21(1984).

We also find highly credible the assertion of la enforcement officers that models more often face coercion to ge them to perform specific sex acts that were not contracte for.[1010] As one of them put it:

> Coercion comes in, especially like some of these witnesses have testified, in the area of anal sex, which many of the models don't want to get into. It really comes into a factor in the bondage and S&M type films. I have talked to models and I have seen films where it's quite obvious that the model had no idea as to what they were getting into. Part of an S&M film, when they start torturing the victim, tying them, whipping them and putting cigarettes out on their body, is the showing of pain. This is what sexually excites some people.
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> Obviously we are not dealing with people that can act, so they can't act the pain. Therefore the pain is very real. It's quite apparent these people do not realize what they have gotten into once they start the filming.[1011]

Certainly their pain may not be lightly dismissed.

At the same time we may not dismiss the strong assertions producers, agents, and models in the sex industry that performe are generally safe from physical coercion.[1012] Actual force threat of force does not, indeed, appear to be a normal part of "mainstream" pornography production.[1013] Rather it seems concentrated in the fringe areas of bondage, sadomasochism, and home-made, noncommercial pornography. Force used to induce young women to enter "mainstream" pornography appears to be applied most often not by filmmakers but by dominating "boyfriends" who in fact play the role of pimp.[1014] All this said, it is nevertheless troubling that the Adult Film Association of America nowhere includes in its "unofficial credo" a pledge to eschew all forms of coercion in recruitment of models.[1015]

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[1010] Los Angeles Hearing, Vol. I, William Roberts, p. 9 100; Los Angeles Hearing, Vol. II, Catherine Goodwin, p. 78-79.

[1011] Los Angeles Hearing, Vol. I, William Roberts, p. 9 100. See note 1015, infra.

[1012] Los Angeles Hearing, Vol. I, Les Baker, p. 203B-7- (President, Adult Film Assn. of America) (describing coercion Linda Marchiano, if it did occur, as "a tragically unfortuna but nevertheless isolated phenomenon."); Los Angeles Hearin Vol. I, William Margold, p. 414-415; Statement of Candida Roya (denying any coercion used in inducing her to become a model 1984 Senate Hearing, supra note 976, at 316 (testimony Veronica Vera) (denied ever meeting "anyone, man or woman, was not participating of his or her own free will.").

c. *Contractual Terms*. Those models who enter pornography voluntarily - that is, without having been physically forced- can expect to enter their new employment under contractual terms quite unlike any others we know of. They will by most standards be well paid - from $250 a day for established models[1016] - but they will be paid strictly in cash[1017] and normally by the number and type of sex acts performed.[1018] Fringe benefits such as medical insurance are unknown.[1019] Models sign a standard release form which gives the film producer or the photographer complete ownership of, and unlimited rights to the material produced.[1020] Once they leave the movie set or the film studio, they have no guarantee of future employment and no ability to control the use of the material in which they appear.

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[1013] *See*, Los Angeles Hearing, Vol. I, George, p. 87 (" in career of over 100 films, I have never seen a director physically grab [a model] and force her to do a scene.").

[1014] *See*, L. Lovelace, *Ordeal* (1980); Washington, D.C., Hearing, Vol. I, Valerie Heller, p. 217.

[1015] Los Angeles Hearing, Vol. I, Les Baker, p. 203B-3. The A.F.A.A. acknowledges five "responsibilities " which center on protection of children and nonconsenting adults from seeing pornography: none of them relate to problems of adult performers. *See*, Los Angeles Hearing, Vol. I, George, p. 86-87. ("I have seen some directors get really violent and have a lot of yelling and throwing things and threatening of the young ladies, they will never work again if they don't want to do a scene . . . . Then, you know, every time I have seen the girls, always regret it afterwards,; there has been a lot of pain involved with doing scenes they didn't want to do".)

d. *Working Conditions*. During a typical day of filming an

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[1016] Los Angeles Hearing, Vol. I, William Roberts, p. 65; Los Angeles Hearing, Vol. I, Chris, p. 98; Los Angeles Hearing, Vol. I, George, p. 85. (noting that he "would make between $1,000 and $2,000 a week"). William Margold estimates that male "superstars" earn $80,000 per year, while "newcomers" earn "around $200 per day." Bennett, *supra* note 972, at 71. The highest salary currently paid - to a *female* "superstar" - appears to be $17,000 per day. Heather Wayne Interview, *supra* note 987, at 58 (statement of Bruce Seven, prominent X-rated fil producer).

[1017] Bennett, *supra* note 972, at 71; Los Angeles Hearing, Vol. I, George, p. 91.

[1018] Los Angeles Hearing, Vol. I, George, p. 85; Lo Angeles Hearing, Vol. I, William Roberts, p. 65 ("going rat being about $250 per sex act").

[1019] Los Angeles Hearing, Vol. I, George, p. 89.

[1020] Los Angeles Hearing, Vol. I, William Roberts, p. 70 71. For the extraordinary effects of such releases *See*, *Faloon v. Hustler Magazine*, 607 F. Supp. 1341(D.C. Tex. 1985) *appea docketed*, No. 85-1359 (5th Cir. 1985) (child whose nude picture *appeared* in *Hustler* had no right to revoke mother's consent t publication, even though pictures had been taken for differen publication and sold to *Hustler* by photographer). *See also Shields v. Gross* 58 N.Y. 2d 338 (1983) (dismissing Brook Shields' efforts to stop publication of nude, highly eroticize pictures taken of her at age ten with her mother's consent).

"X" rated movie or video a performer is expected to engage in at least two sex scenes,[1021] in a manner pellucidly described by Mr. Margold to prospective male "stars":

> You have to be a machine. You have to get it up, get it in and get it off on cue. You have to be able to completely divorce yourself from your surroundings and be able to function in any situation. For example, if you're working on location for a film shoot and staying at a motel for seven days, you have to cope with being in unfamiliar surroundings, getting irregular sleep and living on McDonald's and Kentucky Fried Chicken, and still be able to perform sexually no matter what else is on your mind.[1022]

Workdays are twelve to fourteen hours long, with videos requiring three and films seven days to shoot.[1023] During the filming of sex scenes it appears to be standard practice to restrict access to the set to the models and film crew; one actor is reported to have "hastily [covered] his private parts" when a reporter could see onto the set.[1024] In mainstream pornography females but not males are normally expected to engage in homosexual as well as heterosexual sex,[1025] while in male homosexual pornography women do not perform at all.[1026]

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[1021] Bennett, supra note 972, at 72.

[1022] Id.

[1023] Id.

[1024] Goldman, On the Set of An Adult Film. Adult Video News 10(1984).

[1025] See generally, Badgely Report, supra note 924, at 1213-21 (analyzing contents of 11 pornographic magazines, with lesbian scenes being "a popular subject" while homosexual male portrayals were nonexistent). In a recent review Hustler urged readers to "check out" a film because of the "daring" performance of a male lead as a "bisexual film director." The review continued: "no, he doesn't actually make it with another guy;

e. Health Risks. Precisely because sex is their job, models face health hazards of forbidding intensity. Working three to four days as week, with two sex scenes each day,[1027] any one model may have twenty-four to thirty-two different sexual partners every month, just through work. Even though some performers state that they receive regular medical check-ups,[1028] the odds of contracting sexually transmitted diseases are very high - particularly because performers do not even have the option of using condoms or other "safe sex" techniques.[1029] Not surprisingly, even the rumor that a model is infected with a sexually transmitted disease can ruin his or her career,[1030] but just as obviously such a rumor will often fail to spread before the disease has. Further, it is only the established "stars" who

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this flick is daring, but not that daring." Hustler 18 (April 1986).

[1026] A recent video which included bisexual activity involving several men and one woman was dubbed by one "erotica" reviewer as "not, strictly speaking, a gay tape" and "probably different from anything you've ever seen." Review, Hustler Erotic Video Guide 90-91 (May 1986).

[1027] The typical work week described by one of the models in testimony before us. Los Angeles Hearing, Vol. I, George, p 85.

[1028] See, e.g., Lynn Interview, supra note 977, at 30; Los Angeles Hearing, Vol. I, George, p. 89.

[1029] See, Pacheco Interview, supra note 986, at 25 (description by interviewer of "the only time I've seen a rubber being used in a porno movie.")

[1030] Id. at 30; Bennett, supra note 972, at 72.

can be choosy about their partners.[1031] One of the best known male models described his own experiences in illuminating terms:

> When you're a nobody, it doesn't occur to you to be brave and ask, even though you have a lot at stake. I didn't worry too much about that until the Herpes stuff started to become real. Up until 1982, I had one clap scare. I went and received shots for it. I don't know if I ever had it or not. But I had contact with a known carrier. In '82, we got pregnant for the first time, and having Herpes was the difference between a vaginal birth and a Caesarian section which made a significant difference to us. And I didn't have Herpes and I saw no reason to get it. So I began saying categorically that I wouldn't work with anyone that had Herpes. I had to do this one part with someone who had an active outbreak of Herpes, and we cheated the scene. The person put a towel in her thighs and I ended up f***ing the towel. We had no physical contact. Ironically enough, it turned out to be a beautiful scene."[1032]

When asked who the Herpes carrier was, the model replied that he had "kind of shielded it."[1033]

The advent of Acquired Immune-Deficiency Syndrome (AIDS) might have been expected to produce drastic changes in sex industry practices, but the prevailing attitude seems best reflected in the following, recent comments in a Hustler interview of Amber Lynn, a leading "porn star":

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[1031] Pacheco Interview, *supra* note 986, at 30.

[1032] *Id.*; *See also*, Los Angeles Hearing, Vol. I, George, p. 89. (encountered S.T.D. in fellow performers); Lederer Interview, *supra* note 969, at 66. ("Women who work in the pornography business always have vaginal trichomoniasis or some infection from the working conditions, which run from bad to simply intolerable. At one point there was an epidemic of hepatitis and mononucleosis. The communicable diseases spread quickly." Id. at 66). That a "sex worker" population would be highly vulnerable to sexually transmitted diseases should hardly come as a shock. *See*, W. Darrow, *Prostitution and Sexually Transmitted Diseases* in *Sexually Transmitted Diseases* 109 (K.K.Holmes ed. 1984).

[1033] *Id.*

> "HUSTLER: You're f***ing so many men these days, aren't you afraid of AIDS? Many actors in the business are bisexual.
>
> LYNN: There's an incredible fear of AIDS sweeping through the X-rated-film business right now. All of my girlfriends are talking about it. We're scared to death that we'll find out in three years we've only got a few months left.
>
> HUSTLER: Why do you continue your promiscuous career then?
>
> LYNN: I get a blood test regularly and am very careful about the people I work with. Hey, life's a f***ing gamble anyway, and there is where I want to be. I can't think of doing anything else. That's not to say I'm reckless. For instance, I won't f*** some guy I know has been f***ing a bunch of other guys not for a lousy thousand dollars. It's not worth it to me, because if I get AIDS, then everyone I come in contact with get it and not just the people I work with, but the people I love and care about too.[1034]

Of course, even an occasional sexual contact with a member of a high-risk group carries such a substantial risk of exposure to AIDS[1035] that the gamble Ms. Lynn embraces seems a peculiarly misguided one.

f. Drug Use. Along with the insidious threat of infectious disease, models face a more overt challenge to their physical health: drug use, and in particular, use of cocaine. Few aspects of the world of pornographic modeling seem less free from doubt than the dependence of most performers, at one time or another, on cocaine. The view of one prominent model that in her world "everybody goes through a drug stage"[1036] is perhaps overstated; but involvement of a substantial majority of performers in the use of cocaine seems highly probable.[1037] In the opinion of at least one model, drugs are necessary in her work because "you have to hide, you have to keep your feelings and emotions from being completely destroyed. Each day [in the industry] erodes them away."[1038] It is true that Mr. Les Baker, President of the Adult Film Association of America labelled the problem of drug abuse in his industry a "misconception," contending that such abuse "is a universal problem and we of the A.F.A.A. just a small part thereof."[1039] For him drugs usage by pornographic models is simply part of an infection spreading through the whole "entertainment industry."1040 William Margold put it somewhat more positively:

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[1034] Lynn Interview, supra note 977, at 26-30.

[1035] See, Curran, The Epidemiology and Prevention of the Acquired Immune-deficiency Syndrome, 103 Ann. Internal Medicine 657, 660 (1985) ("the risk of exposure to HTLV-III/LAV infection from a sexual encounter with an occasional partner for a gay man is very high, several times higher than for a heterosexual man or woman.") Blattner, Epidemiology of Human T-Lymphotropic Virus Type III and the Risk of the Acquired Immune-Deficiency Syndrome, 103 Ann. Internal Medicine 665(1985).

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[1036] Ginger Lynn Interview, supra note 982, at 36.

[1037] See, Los Angeles Hearing, Vol. I, William Roberts, p. 98. ("Drugs play a very large part in [the pornography industry]; "George", supra note 1013, at 84 ("eighty to ninety percent of the models do delve into cocaine"); Interview: Traci Lords, Adult Video News 34 (Aug. 1985) ("Many girls go through mental breakdowns or get into drugs really bad. They feel so alone because there's just nothing there. So they get into the coke crowd and that's what keeps them going.")

[1038] Heather Wayne Interview, supra note 987, at 58. Accord, Joanna Storm Interview, supra note 979, at 60 ("I guess I used [cocaine] to escape.")

[1039] Los Angeles Hearing, Vol. I, Les Baker, p. 203B-7.

> I know that drugs are in my industry. I know that drugs are in almost any form of creative people. Some people seem to need them to do whatever they have to do.[1041]

We of course are in no position to compare the severity of drug abuse in the pornography industry with that in other fields; it is sufficient simply to note that by all accounts such abuse exists and inflicts serious damage on those it touches.[1042]

g. "Modeling" vs. Acting. The reference of Mr. Margold to the "creative people" performing in mainstream pornography raises for us, quite apart from the issue of drug abuse, a question of substantial importance in attempting to describe the role and the lot of models. To what extent is their work in fact "creative"? More bluntly, to what extent are they actors as opposed to glorified prostitutes? More than aesthetic judgments hang in the balance: for if the performing in sexually-explicit films can be called truly creative, it is possible to imagine it bringing intangible, subjective benefits to models that scrutiny of contract terms, working conditions and the like could never reveal. Fortunately, it is an issue on which models themselves seem largely in agreement. Mr. Margold, himself a model,

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1040 Id.

1041 Los Angeles Hearing, Vol. I, William Margold, p. 413.

1042 See, Los Angeles Hearing, Vol. I, Les Baker, p. 203B-7 (suicide of young model linked to drugs).

recently was asked, "Is acting ability and training an important factor [in breaking into "X" rated films]?[1043] His answer was simple and instructive:

> No, I don't think so. I think what's most important is being in the right place at the right time, having the right connections and getting the right roles.1044

Mr. Margold went on to explain that the reason some male models "get their foot in the door" but "fail to make it to superstardom" is not for lack of creative drive or talent, but because they "cannot keep functioning reliably shoot after shoot."1045

One former model who testified before us was even more careful about distinguishing "modeling" from "acting":

> That also reminds me somehow, what I really wanted to say is when you are paid, to 'act' in these videos and films and stuff, you know, a lot of them say that I am an actor, I am an actress, or something, I am getting paid to act.
>
> When the producer or director pays you, after you leave, and before the shooting, you are paid not by how many lines you have or by what part you have you may have five lines or you may have 107 pages of dialogue, but you are paid per sex scene and that's how they quote it to you. If you have one sex scene a day you get like two hundred to two hundred fifty dollars for that, if you have two sex scenes, there's three or four hundred for two sex scenes. You are paid more for anal or girls are paid more for when they are working with two guys.
>
> So the models that say they are getting paid to act are only doing that to pretty much preserve their job security because, you know, anybody in the industry

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[1043] Bennett, supra note 972, at 72.

[1044] Id.

[1045] Id.

pages tightly bound

> knows you are paid per sex act and not for acting.[1046]

Several former models have made similar public assessments, declaring flatly that "the market today is just not conducive to anyone who takes their acting seriously."[1047] Adult filmmakers shoot with only the barest of scripts, desperate simply to get the requisite number of sex scenes on film with an alluring title and package.[1048] The result for performers is that, in the words of a leading model:

> You never really forget the sex, you forget the movie. There's a lot of movies on the market that are exactly the same.[1049]

When asked to remember a movie she was proud of, she tellingly replied:

> Yeah, I think one of the films I am most proud of is 'Sex Waves.' There was acting in it, a story to it . . . it wasn't an excuse to have sex.[1050]

As one knowledgeable observer told us, sex scenes are normally shot in one take, and dialogue scenes in two or three:

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[1046] Los Angeles Hearing, Vol. I, George, p. 84-85.

[1047] Where are They Now, supra note 970, at 52 (statement of Jessie St. James). Accord, Id. (statement of Kay Parker) ("Empty plots, with soulless characters"), and Id. (statement of Candida Royalle) ("An actress has very little say over the creative aspects of the films she's in.")

[1048] See, Los Angeles Hearing, William Roberts, Vol. I, p 62-72.

[1049] Traci Lords Interview, supra note 1037, at 34.

[1050] Id.

> They do not spend a lot of time on the dialogue. They do not look for perfection. If they [looked] for perfection, most of the porn movies would still be in production. The people they are using are not well known actors and actresses and they are not very skilled in this area.[1051]

From our limited direct observation of "X"-rated material we must agree: skilled acting seems irrelevant to what is depicted.[1052]

There are, of course, those who disagree. One model speaks of always performing "within the character" he is portraying, even in sex scenes;[1053] another of how "[t]he voice changes, the walk changes, the face changes, everything changes" while he plays the character he has portrayed through ninety-seven "features";[1054] a third (more dubiously) of the "ultimate acting challenge" involved in managing to "fool the public" into thinking she enjoys the sex, which she considers pure "exploitation."[1055] Clearly it is impossible to draw a bright, unwavering line between legitimate "acting" and pornographic "modeling.

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[1051] Los Angeles Hearing, Vol. I, William Roberts, p. 68.

[1052] This general distinction between "acting" and pornographic performing seems to have a parallel in the work of fashion modeling:

> Few male centerfold discoveries are fashion model material. Carl Garrison and the select others who have put their clothes back on to forge a career all possess the requisite suit size - 40 regular or thereabouts- as well as a special look and a special drive. On the other hand, the requirements for nude modeling, as one auditioner for a male flesh magazine explains, are "body, face, cock," not necessarily in that order.

[1053] Pacheco Interview, supra note 986, at 24.

[1054] Male Model, supra note 926, at 185.

Yet, ultimately we are faced with the simple fact acknowledged even by one of the most partisan of the adult film industry's fans: "Jealousy and most other human emotions (except fear and lust) are rarely expressed in adult films."[1056] Worse, as another sympathetic critic has conceded, "hard-core guarantees realism, . . . yet it remains incapable of showing pleasure."[1057] In a medium where virtually no human emotion (not even sexual pleasure!) can be expressed, and where, moreover, the performers are chosen neither for training in acting nor for natural acting talent, it seems to us all but ludicrous to call them "actors." We do not, therefore, consider it even the mildest paradox that the performers in live or filmed pornography are not treated on an equal footing as other performers by such organizations as Actors Equity and the Screen Actors Guild.[1058] Nor do we consider one of the rising male models to be wholly misguided in describing his job as, simply, f***ing pretty girls for a living."1059

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[1055] Ali Moore Interview, supra note 976, at 9.

[1056] R. Rimmer, The X-Rated Videotape Guide 28(1984).

[1057] G. Lenne, Sex on the Screen: Eroticism in Film 5(Jacobs trans. 1985).

[1058] It is our understanding that at least one prominent pornographic model is a member of Actors Equity, but that his membership depends on work he did in the legitimate theatre. See, New York Hearing, Vol. II, Colleen Dewhurst, p. 190-91.

h. Career Prospects. Just as sex modeling appears to offer few opportunities for creative expression, so too it seems to allow only sparse chances for long-term employment and remuneration. The life of a typical model's career is extremely short, usually not more than a few months or years. Of twenty new male "stars" each year in "adult" films, only about half a dozen will remain in the business for over a year.[1060] One of the few women to survive long in the industry, when asked what advice she would give to new female models, replied:

> I would tell them not to burn themselves out so fast. What happens is that they become big names and everyone wants them. A couple of years down the line, these girls are going to find people telling them they're overexposed. The typical line is something like we can't pay you a great deal of money because you're not a name yet. Then when they use you in every damn thing around and you become dependent on the income, they tell you we can't pay you very much because you're overexposed. They're setting themselves up for a really bad experience. I had a six year career. I think the reason it was that long is because I would only do three or four films a year. I tried to be choosy. These new stars shouldn't depend on hardcore as a full-time income. The directors are gonna grab them, chew them up, and spit them out real fast.1061

Some models manage to remain for longer periods in the "X" rated

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[1059] Porn Star Confessions, supra note 1003, at 61. See, Joanna Storm Interview, supra note 979, at 63 ("Films let me express a lot of my 'extra sexual desire.' If I didn't do films, I'd probably be in bed with the postman.")

[1060] Bennett, supra note 972, at 71.

[1061] Interview: Candida Royalle, Adult Video News 38(July 1985).

world, but after they reach the age of forty almost never appear naked, and only rarely appear in sexual intercourse.[1062] Women can almost never expect to hang on in any but minor roles after age thirty,[1063] although a few women have successfully moved into production and management roles.[1064] As for switching to legitimate acting, Mr. Margold has said bluntly, "if someone thinks he's going to get into mainstream through porn, he's deluding himself."[1065] Whether in films or traditional modeling, his observation seems to hold fast.[1066]

As for money, models in the sex industry collect none of the residuals on which professional actors expect to survive through lean years.[1067] One angry former model was quoted at the time she left the business as follows:

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[1062] Rimmer, supra note 1145, at 28.

[1063] Id.

[1064] One such woman is Candida Royalle, whose written statement is on file with the Commission. See also, Candida Royale Interview, supra note 976. Other prominent women who have survived in aspects of the "adult entertainment" business are Dottie Meyer (management position at Penthouse), who testified before us; Seka (mail order pornography business), and Veronica Vera (writing for such "adult publications as Puritan magazine). See, 1984 Senate Hearing, supra note 975, at 313-22 (statements of Seka and Vera).

[1065] Bennett, supra note 972, at 72.

[1066] See, Male Model, supra note 926, at 186 (statement of Jack Wrangler that "a lot of companies, film companies as well, won't hire you if you have done nude modeling whether it was for Playgirl or for Playboy or whatever.") See also, Miller, supra note 1006, at 284-86 (discussing death of Dorothy Stratton, whose "death was a cruel blow to Playboy, since she was the first Playmate, of all the many Playmates, who looked as if she might become a Hollywood star . . . . One after another, the Playmates disappeared into obscurity. . . ." Id. at 286).

> And they deserve it. Do you know what it's like to have somebody pay you five hundred dollars to do two sex scenes, considering the money he's gonna get back? If you want to know something, I've got nothing really to show for it.[1068]

Her experience seems common, and her current dilemma wrenching.

4. Modeling and Personal Life. As a job, sexually-explicit modeling has dramatically serious defects - from poor working conditions to disease, drugs, economic insecurity, and exclusion from mainstream acting. Modeling, however, appears to have consequences for its participants that extend deeply into their personal lives as well. Limited as our inquiry could be with regard to the world of modeling in general - and to the personal lives of performers in particular - we would be remiss if we failed to take into account what evidence does exist. On the whole, we believe the evidence before us to be highly suggestive in this area - suggestive as much of the attitudes of others as of the feelings of the performers themselves.

A few of the performers in this field, to begin with, speak in glowing terms of the experience. One of them, a former "Pet of the Year" in *Penthouse*, described to us how her marriage had remained strong and happy after her selection for the honor and then during her subsequent career at the magazine in management positions.[1069] Another, speaking before a Senate subcommittee "not only for myself but for every woman that I know in the sex industry," declared:

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[1067] In this respect, as to a lesser extent with respect to age limitation, "modeling" in pornography is similar to traditional modeling - which, unlike acting, is not organized in unions and thus has never established residual, retirement, and fringe benefit standards. See, Male Model, supra note 926, at 109-50.

[1068] Heather Wayne Interview, supra note 987, at 58. Bruce Seven, a prominent X-rated film producer, was quoted in the same interview as agreeing with Ms. Wayne, listing only four female performers "who made anything out of it." Id.

> We do not see ourselves as victims. We do not need to hide in the shelter of being somebody's victim. We accept responsibility for our own lives.[1070]

And a third related how he had maintained a happy marriage and fathered two children during his career adding that, in his words, "I've made the decision that I will abide by the incest taboo, completely."[1071]

Reassuring as these comments are, they stand in a clear minority. William Margold once again offered the most straightforward summation of what modeling means for the personal relationships of models:

> Whenever I'm interviewing someone who wants to get into porn, I always ask them, "Do you have anybody that you will hurt by doing this?" It would be ideal if someone had no relatives - disenfranchised human being devoid of any past that would haunt them and any kind of

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[1069] New York Hearing, Vol. II, Dottie Meyer, p. 301-03. Ms. Meyer, it should be noted, does not appear to have performed in any material depicting actual sexual conduct.

[1070] *1984 Senate Hearing*, *supra* note 975, at 317 (statement of Veronica Vera). Ms. Vera, of course, alluded elsewhere to having suffered sexual abuse as a child.

[1071] *Pacheco Interview*, *supra* note 986, at 23-24.

> present or future that they could destroy. If it's a man, he also better be single because, unless he's married to the most magnanimous of women, it will tear her insides out.[1072]

He went on to point out its effects on the personal reputation of women involved.

> And I'd like to point out that for a woman, there's even more of a stigma than for a man. She'll be called a prostitute and a whore and thought of as sleazy, cheap and slutty. And she has to understand that what she does now will haunt her the rest of her life.[1073]

Mr. Margold's view, bleak as it is, has the weight of his thirteen years' experience in the field behind it; it is, moreover, continually echoed in the testimony and public statements of others who have knowledge of the industry.

Personal relationships, to begin with, appear to be severely threatened by modeling in pornography. Romances as well as family ties are often strained or broken.[1074] One young man, who had been lured into making "adult" films at age seventeen, told us about his feelings after leaving modeling and entering a drug rehabilitation program:

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[1072] Bennett, *supra* note 972, at 72.

[1073] *Id*.

[1074] *See*, *e.g.*, Los Angeles Hearing, Vol. I, Chris, p. 93-94 (relationship with boyfriend broken); *Ginger Lynn Interview*, *supra* note 992, at 30 (being known as porn star "stops the whole magical process" of romantic attachment, but still accepted by family); *Traci Lords Interview*, *supra* note 1037, at 34 ("You don't have a personal life.") *Ali Moore Interview*, *supra* note 976, at 9-10 (modeling makes relationship with husband "very tough"; family members "know nothing of any porn films"); *Heather Wayne Interview*, *supra* note 987, at 32 )modeling "destroys your sex life," and, according to Bruce Sevens, porn producer, "really screws up relationships.") Los Angeles Hearing, Vol. II, Miki Garcia, p. 116. (*Playboy* "Playmates" suffer alienation from family and friends). *But see*, Los Angeles Hearing, Vol. I, Mary, p. 78 (husband found "it was very hard for him to adjust . . .

> I don't know, I feel scared to have a sexual relationship with a girl. I don't know what it's going to be like or if I am going to be too rough.[1075]

Candida Royalle, a major "star" (and now producer) in the industry, told *Forum Magazine* recently that after her marriage she had ended her performing because "[o]nce wed. . . she couldn't quite bring herself to do the sex scenes."[1076] Even that may be of little avail: as one "X" rated film producer put it, "A man getting involved with an ex-porn star will always shove it back in her face."[1077]

What relationships do continue for models are often highly negative. Thus many female models live with highly abusive husbands or boyfriends, whose relationship to them is that of pimp to prostitute.[1078] Others report suffering rape[1079] or

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to me doing this . . . [and] wasn't very pleased with me," but it "hasn't really affected my married life"; "several relatives stopped speaking to me").

[1075] Washington, D.C. Hearing, Vol. II, Jeff, p. 173.

[1076] *Candida Royalle Interview*, *supra* note 976, at 42.

[1077] *Heather Wayne Interview*, *supra* note 987, at 58.

[1078] *Lederer Interview*, *supra* note 969, at 63; *See*, Washington, D.C., Hearing, Vol. I, Sarah Wynter; Washington, D.C., Vol. I, Valerie Heller; New York Hearing, Vol. I, Linda Marchiano. *See also*, *Heather Wayne Interview*, *supra* note 987, at 58 ("[Erotic Film Guide]: Actor William Margold also says that actresses seek out abusive boyfriends and husbands, the dregs of society, because they want to punish themselves. Any comment?

demands that they service agents or producers.[1080] Indeed, some may drift directly into "call girl" status.[1081]

> I was never viewed as a human being. . . . Most people, right off the bat, assume I am a piece of meat, a porno star, a floozie.[1082]

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Wayne: It's hard to find a nice man who'd want you. And I guess you figure you wouldn't deserve a nice man.").

[1079] *Lederer Interview*, *supra* note 969, at 67; Los Angeles Hearing, Vol. II, Miki Garcia, p. 116, 124.

[1080] Los Angeles Hearing, Vol. I, Chris, p. 93; *1984 Senate Hearing*, *supra* note 975, at 179 (Linda Marchiano statement). The "casting couch" is, unfortunately, apparently not unique to the pornography segment of the entertainment industry.

[1081] Los Angeles Hearing, Vol. II, Miki Garcia, p. 117. Ms. Garcia, until 1982 the director of Playmate Promotions, asserted that, among many other abuses, former Playmates "were involved in an international call girl ring with ties to the Playboy mansion." *Id*; Playboy Enterprises, in a letter from its counsel of November 6, 1985, accused her of "bearing false witness" in "efforts for self-aggrandizement," but offered no specific evidence rebutting her accusations. Until she left *Playboy*, Ms. Garcia occupied a position (conceded by all sides ) of responsibility and trust. Documents submitted to the Commission by Ms. Garcia indicate, further that she had received outstanding ratings for performance of her duties at *Playboy*, and that at least at the time of her resignation had communicated her feelings about the treatment of the Playmates with her superiors. We are, of course, in no position to evaluate the truth of this accusation - or of the others included in her testimony - but we see no clear reason why, as *Playboy* suggests, Ms. Garcia's account should be dismissed out of hand. It accords, indeed, with statements submitted by two other former Playmates (Susan Amidon and Brenda MacKillop), and in significant respects with a recent full scale overview by an outsider. Miller *supra* note 1006. ("Many girls drawn into this orbit found the world of *Playboy* was not a pretty place . . . .") *Id*. at 160. We can only urge a thorough investigation of Ms. Garcia's allegations regarding problems faced by the Playmates she supervised, which included sexual exploitation and harassment, rape, murder and attempted murder.

[1082] *Interview: Linda Wong*, Adult Video News 19(March 1985).

"Adult" publications even those which are "soft core," view models as products.[1083] In the midst of that environment a young female performer said that she "just hated [herself] every day"[1084] and a young male told us it "[m]ade me feel worthless."[1085] As Andrea Dworkin has explained, that valuation is a central element of contemporary pornographic modeling.[1086] And it is a valuation we strongly reject.

## C. CONCLUSIONS AND RECOMMENDATIONS

In sum, then, we have found, within the admittedly severe limitations of the evidence, the following propositions to be generally true of commercial pornography's use of performers:

(1) that they are normally young, previously abused, and financially strapped; (2) that on the job they find exploitative economic arrangements, extremely poor working conditions, serious health hazards, strong temptations to drug use, and little chance of career advancement; and (3) that in their personal lives they will often suffer substantial injuries to relationships, reputation, and self-image. We acknowledge that exceptions exist to

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[1083] Los Angeles Hearing, Vol. II, Miki Garcia, p. 121.

[1084] Heather Wayne Interview, supra note 1051, at 58.

[1085] Washington, D.C., Hearing, Vol. II, Jeff, p. 171.

[1086] A. Dworkin, Pornography: Men Possessing Women (1979) ("Contemporary pornography strictly and literally conforms to the word's root [Greek] meaning: the graphic depiction of vile whores, or, in our language, sluts, cows (as in: sexual cattle, sexual chattel) . . . ." Id. at 200.

all these findings, and we concede, as well, that extremely thorough investigation might prove one or more of them untrue. Unhappily the power to conduct such an investigation is not in our hands. And the industry itself, which of course knows the full truth of the matter, has shown little interest in sharing that knowledge with us. We are, therefore, left with the unattractive but firm obligation to make recommendations in this area based on what we in our limited way have been able to uncover.

The approach we propose in this area is a cautious but urgent one. Caution we believe to be required from the incomplete character of the evidence currently available. Urgency, however, arises from the extremely serious nature of the harms apparently being inflicted on many young and vulnerable people. Both of these interests will be best served, we believe, if federal and state governments initiate thorough investigations - by agencies or committees possessed of substantial resources and full subpoena powers - of the use of "models." Those nvestigations should, in our view, proceed from three related, ut distinct perspectives: pornographic modeling as (1) a subset f prostitution; (2) a form of sex discrimination; and (3) an nvasion of performers' personal rights. Briefly we will nsider the parameters of each of these perspectives and ssible concrete courses of action available under each

1. *Modeling and Prostitution*. It seems abundantly clear m the facts before us that the bulk of commercial pornographic

modeling that is, all performances which include actual sexual intercourse, quite simply a form of prostitution. So much was directly asserted by representatives of prostitutes' organizations who testified before us,[1087] as well as representatives of law enforcement[1088] and effectively denied by no one. Every court which has examined the questions from this standpoint has agreed, reasoning that where persons are paid to have sex it is irrelevant that the act is for display to others.[1089] As prostitution is conduct which the state has a strong interest in regulating, the First Amendment does not preclude that regulation merely because it is labelled "speech" or is filmed.[1090] It is also readily apparent that the interests which have in the past most powerfully justified the state's concern over prostitution-exploitation of the young and the weak, prevention of disease-are just as strongly implicated by pornographic "modeling."

If upon further study our equation of prostitution and

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[1087] Los Angeles Hearing, Vol. II, Margaret Prescod, p. 215; Los Angeles Hearing, Vol. II, Priscilla Alexander, p. 224.

[1088] Los Angeles Hearing, Vol. I, James Docherty, p. 15. *See also*, Chicago Hearing, Vol. I, Nan Hunter ("some women work in both pornography and prostitution": statement does not contest their overlapping character).

[1089] *See*, *United States v. Roeder*, 526 F.2d 726(10th Cir. 1975), *cert. denied* 462 U.S. 905(1976); *People v. Sonter*, 178 Cal. Rptr. 111(Ct. App. 2d Dist. 1981); *People ex rel. Van DeKamp v. American Art Enterprises*, 142 Cal. Rptr. 338(Ct. Appp. 2d Dist. 1977); *People v. Fixler*, 128 Cal. Rptr. 363 (Ct. App. 2d Cist. 1976); *People v. Kovner* 96 Misc. 2d 414 (sup. Ct. N.Y. Co. 1978). *See also*, *People v. Marta*, 203 Cal. Rptr. 685(Ct. App. 1st Dist. 1984) (defendant convicted of pimping for hiring women to have on-stage sex with customers in a theater).

[1090] *Id.*; *See*, *United States v. O'Brien*, 391 U.S. 367(1968).

"modeling" proves to be true, it is incumbent upon the federal government and the states to consider carefully how to respond. Some of our witnesses have in fact urged *legalization* of pornographic modeling, and of all prostitution, as a means of eliminating its clandestine character and allowing "sex workers" to improve the conditions under which they labor.[1091] Insofar as that proposal would permit the recruitment of men and women into prostitution, the promotion of prostitution, or the living on the vails of prostitution - all characteristics, so far as we can ell, of the producers and distributors of commercial pornography it flies in the face of established international mores,[1092] longstanding national policy,[1093] and simple good sense.[1094] We agree with the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted by the General Assembly of the United Nations in 1949, that the State should punish any person who "[p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person" or who "[e]xploits the prostitution of another person, even with the consent of that person."[1095] Lifting sanctions against the "employer" seems no more attractive a solution with regard to exploitation in pornography than it would, for example, with regard to child or subminimum-wage labor. "Legalization," if extended to producers and others currently considered "panderers" under state laws, would only make it easier for them to persuade more vulnerable young people to participate in a world that seems to us inherently abusive.

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[1091] Los Angeles Hearing, Vol. II, Margaret Prescod, p. 15; Los Angeles Hearing, Vol. II, Priscilla Alexander, p. 224; hicago Hearing, Vol. I, Nan Hunter.

[1092] *The International Convention for the Suppression of he Traffic in Women and Children, League of Nations - Treaty eries* (1922) (No. 269), adopted by twenty-eight member nations f the League of Nations in 1921, established the duty of all ignatory states to punish the procuring or promoting the rostitution of any women by force, or any woman under age of wenty-one, even with her consent. *See*, V. Bullough, *The History f Prostitution* 184(1964). The United States, which of course efused League membership, never acceded to the Convention. In 949 the United Nations adopted the Convention for the uppression of the Traffic in Persona and of the Prostitution of thers, which committed signatory states to punish the procuring r the exploitation of the prostitution of another, without egard to any age limit. *Report of Mr. Jean Fernand-Laurent, pecial Rapporteur on the Suppression of Traffic in Persons and he Exploitation of the Prostitution of Others, Economic and ocial Council, United Nations* (1983), Annex VII [hereinafter, *nited Nations Report*]. At present both international onventions are in effect - although not ratified by the United ates and are supplemented by the Convention on the Elimination All Forms of Discrimination Against Women, adopted by the ited Nations in 1979, which also requires (in Article 6) the gnatory parties to "suppress all forms of traffic in women and ploitation of prostitution of women." *Id.* Annex IX. On their e these agreements all seem fully applicable to commercial pornography.

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[1093] The clearest expression of this policy is the White-Slave Traffic Act (the Mann Act), ch. 395, 36 Stat. 825 (codified as amended at 18 U.S.C. SS2421-2424) (1970 & Supp. 1985), which, *inter alia* forbids interstate transportation of women or girls for the purposes of prostitution.

[1094] For excellent discussions of the pitfalls of legalized prostitution, *see*, K. Barry, *Female Sexual Slavery*, 128-134 (1984); C. Winick & P. Kinsie, *The Lively Commerce* 211-2432 (1971); and of course the classic work studying legalized prostitution in 19th century Europe, A. Flexner, *Prostitution in Europe* (1914). For a jolting overview of the pimp-prostitute relationship, *See*, L. Lee, *The Social World of the Female Prostitute in Los Angeles*, PH.D. Diss. (1982).

[1095] *United Nations Report*, *supra* note 1092, at 60 (Annex VII), quoting resolution 317 (IV) adopted by United Nations on December 2, 1949.

With regard to penalties directed at models themselves,
ever, the argument for decriminalization seems much stronger,
several grounds. First, it is not uniform policy in the
trict of Columbia to make the simple act of prostitution
thout accompanying "solicitation") a crime.[1096] Second, those
are misguided, desperate or frightened enough to turn to
nographic modeling are unlikely to be deterred by the
atively light sentences typically imposed on those convicted
prostitution.[1097] Third, models are often so badly harmed by
ir experience that the addition of criminal penalties to their
ering - which includes a never-ending fear that humiliating
tographs or films will be publicly exhibited - may seem
rfluous and cruel.[1098] Finally, fear of prosecution may make
models less likely to come forward and provide evidence
nst those who exploited them.[1099]

While we do not believe, therefore, that prostitution laws are a perfect weapon in every respect for protecting models from procurement and abuse, their application at least to producers and agents seem fully justified. The experience of Los Angeles, where pandering prosecutions and "red-light" nuisance abatement actions have been successfully brought by police and prosecutors, deserves careful study in other jurisdictions. There seems little warrant for a state or locality to tolerate the production of commercial pornography that is as exploitative as that discussed above unless its basic approach to prostitution itself is radically different from the national norm.

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[1096] For a listing and analysis of state laws on
titution, *See*, *Note, Right of Privacy Challenges to
titution Statutes*, 58 Wash U.L.Q. 439, 471-80(1979) (four
es and District of Columbia punish solicitation for
itution but not act itself). The act of prostitution was
n offense under English common law. *Id*. at 443.

[1097] *See*, Winick & Kinsie, *supra* note 1094, at 218-19.

[1098] *See*, *e.g.*, Barry, *supra* note 1094, at 125-28; *Fraser
t*, *supra* note 936, at 530-37.

[1099] Of course, it is also possible that with no fear of
nal prosecution themselves, models will be impervious to
e pressure to give evidence against their employers. On
e the threat of a prostitution charge - in every state no
han a misdemeanor - seems unlikely to persuade many models
ray their colleagues and thereby jeopardize their careers.

Quite apart from the use of pandering statutes, however, an approach that seems to us worthy of careful study is imposition of sanctions on any persons trafficking in products or materials which they know or have reason to know were manufactured or marketed through the use of persons engaging in prostitution.

Such legislation would parallel existing legislation which forbids trafficking in products manufactured through child labor or through certain oppressive adult labor practices.[1100] Because not directed specifically at speech,[1101] and because clearly grounded in legitimate governmental interest in controlling prostitution, it would seem likely to survive constitutional ttack.[1102] Given the federal government's long commitment to se its powers to regulate interstate commerce to attack rostitution in every form, we are, indeed, somewhat surprised hat such a proposal has not been seriously studied before now. evertheless, the idea is sufficiently novel and could affect so uch commerce not directly within the purview of our charter that e merely offer it for consideration and debate.

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[1100] See, United States v. Darby, 312 U.S. 100(1914).

[1101] A company which hired employees whose duties consisted of providing sexual services to potential clients of the firm could be subject to sanction under such a law.

2. Sex Discrimination. Along similar lines we urge careful tudy by the Department of Justice of the extent to which roducers of sexually-explicit photographs, films, and video apes are acting in violation of federal civil rights laws, and n particular of Title VII of the Civil Rights Act of 1964.[1103] at law provides, in pertinent part:

> It shall be an unlawful employment practice for an employer. . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.[1104]

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[1102] Cf., New York v. Ferber, 458 U.S. 747, 761(1982) dvertising and selling child pornography "provide an economic tive for and are thus an integral part of the production of ch material, an activity illegal throughout the nation. It rely has been suggested that the constitutional freedom for eech and press extends its immunity to speech or writing used an integral part of conduct in violation of a valid criminal atute. Giboney v. Empire Storage 7 Ice Co., 336 U.S. 490, 498 949)."); Wirtz v. Keystone Readers Service, Inc. 282 F. Supp. l (S.D. Fla. 1968) (magazine subscription service violated deral law prohibiting illegal labor practices by employing high hool student at below minimum wage).

[1103] 42 U.S.C. S2000(e).

[1104] 42 U.S.C. S2000 (e)-2(a)(1).

This provision has been interpreted widely to protect employees from having to prostitute themselves to supervisors or submit themselves to sexual intercourse or harassment to keep their jobs.[1105] One court declared flatly, "An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."[1106]

On its face this principle would seem to make illegal the requirements that a performer engage in sexual activity as a condition of his or her employment. There are, however, two limitations on its scope that are at least arguable relevant to production of pornography. The courts have ruled that sexual demands (1) must be "unwelcome,"[1107] and (2) must include disparate treatment of the sexes.[1108] The first of these limitations does not seem a serious one: the overwhelming factor motivating the sexual conduct of pornographic models is financial need, certainly not a desire to have sex with the partner assigned to him or her for the scene.[1109] The sexual act is thus n no way "welcome" in the sense we understand the law to xempt.[1110] With regard to the "disparate treatment" quirement, we note simply that women and men are normally paid fferent rates in the industry for the same sex acts,[1111] and at women in mainstream pornography are expected to engage in mosexual activity while men are forbidden to.[1112]

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[1105] *See*, *Hensen v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Service Electric & Gas*, 568 F.2d 983 (D.C. Cir. 1979); 29 C.F.R. S1064(1)(a).

[1106] *Hensen*, *supra* note 1194, 682 F.2d at 908.

[1107] *Id*. at 904.

[1108] *Id*. at 904, 905.

[1109] *See*, Text to notes 984-991, *supra*.

We therefore believe it likely that much of the commercial oduction of pornography runs afoul of Title VII, even nsidering the technical limitations on its reach. Further, we lieve that Title VII embodies a principle that should not be rangled by technicalities: no one in this country should have engage in actual sex to get or keep his or her job.[1113] To e extent that Title VII and comparable state statutes do not rrently reflect that principle, we urge serious and rapid nsideration of proposals to broaden their reach.

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[1110] Thus Hensen defined "conduct" as "unwelcome" if "the ployee did not solicit or incite it" and "regarded the conduct undesirable or offensive." 682 F.2d at 903. Model Ali Moore a vivid example of an employee finding such conduct nwelcome": "I'm not going to say all that stuff about how I ve to f**k on camera.... I guess I really don't like the sex ch." Ali Moore Interview, *supra* note 976, at 9.

[1111] Los Angeles Hearing, Vol. I, William Roberts, p. 65.

[1112] In "gay" pornography, of course, women are excluded together. *Id*.

[1113] We emphasize "actual," for the simulated sexual tivity regularly engaged in by legitimate actors in their roles es not provoke the same concerns as actual sex. Simulated ual conduct does not impinge on personal privacy to so rmous a degree; it risks no transmission of venereal disease; risks no pregnancy; and, finally, it carries no comparable gma. For a comparison of sex modeling and legitimate acting, , text to notes 1043-1059, *supra*.

3. Invasion of Personal Rights. During the course of our review of the position of performers in pornography, we have encountered evidence that they suffer physical coercion, damage to health, serious economic exploitation, and virtually complete loss of reputation. The pornography which they helped create will live on to plague them long after they have extricated themselves from modeling. Its effects, subject performers to long-term effects potentially worse than any other form of sexual abuse, a fact noted tellingly by Dr. Ulrich Schoettle in the context of child pornography.

> Pornography is a graphic form of exhibitionism. Unlike prostitution where a degree of "privacy" exists during the sexual acts, pornography literally makes the child's body "available" for anyone willing to pay the price anywhere in the world.

The "privacy interests" of performers in pornography seem to us real and compelling[1114] while the value of the material itself is often indisputably minimal.

It, therefore, seems important for judges and lawmakers to carefully consider how performers may be protected from the unsavory characters who exploit them, and in particular what civil and equitable remedies performers may have in court. There has been disagreement in what we have heard over the current status of the law in this regard;[1115] we know only that they have een exceedingly rare.[1116] If new remedies are needed, as we are clined to think they are, they should be framed in ways to courage plaintiffs to come forward: perhaps by providing for eble damages in certain types of cases (such as coercion or aud) and reasonable attorneys' fees.[1117]

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[1114] Cf. New York v. Ferber, 458 U.S. at 759 n. 10.

[1115] Compare, 1984 Senate Hearing, supra note 975, at 249 (statement of Catherine MacKinnon) (Statutes of limitations, single-publication rules, and other technical limitations make actions by performers impractical at present), with Washington, D.C., Hearing, Vol. I, Barry Lynn, p. 24-25 (such actions are not

We hope, too, that in studying the availability and sirability of such private remedies, courts and legislatures ll be sensitive to the issue of "consent." Because of their uth, their economic desperation, and their troubled back- ounds, we submit that few performers are fully able to preciate the meaning and the magnitude of their decision to age in sexual performances - and throw away all control of the ulting material for the rest of their lives. Just as it is ropriate to provide consumers with extensive government tections against the consequences of their ignorance, so every lt needs special safeguards against making a decision which n the pornography industry's strongest booster admits "will

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own).

[1116] The cases cited in notes 960-963, supra are the only s we have been able to uncover in this area.

[1117] S. 1187, introduced last year by Senator Arlen ter, essentially contains both these provisions - treble ages and attorney's fees - in seeking to help adult ography victims obtain compensation for production or tribution of material in which they were coerced or dulently induced to appear. We note that constitutional es may arise if equitable remedies are not carefully tailored he First Amendment requirements, and that scienter is likely e of some constitutional relevance in determining how wide net of liability may be cast.

haunt her the rest of her life."[1118]

Otherwise she may find that photography's freedom from time and space, so heartily welcomed by Bazin, has become her dungeon.

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[1118] Bennett, supra note 972, at 72.

## Chapter 3

## Social and Behavior Science Research Analysis

### oduction

The Commission has examined social and behavioral science arch in recognition of the role it plays in determining legal dards and social policy. This role, while notable, is not, should it be, the sole basis for developing standards or cy. The lack of funding and the inability under the mandate he Charter to conduct original research has resulted in the to rely on existing information. The amount of research ucted in the last fifteen years provides a reasonably icient base to reevaluate answers to old questions. Some t argue that given the controversy and heated debate that itably surrounds any discussion about pornography, in some , we might be better off relying on studies initiated, ed, and presented outside the context of such a milieu.

The major question which frames this research review is: are the effects of exposure to pornography and under what tions and in what kinds of individuals are these effects fested? We also have structured this review with the wing considerations in mind: (1) that it provides some into the policy-making process; (2) that it provides social ce information for public consumption and understanding; and that it provides the research community with further ions for investigation.

While the nature of effects is the focus of this section, we have also examined public opinion on pornography to systematically describe the nature of public perceptions of and experiences with such material as well as policy preferences. In terms of effects, correlational as well as experimental studies on sexual offenders as well as on nonoffender populations were examined. For background purposes, we have also presented brief summaries of what some predecessor Commissions have concluded about the social science evidence before them.

Some observations on terminology and on the character of social science evidence are appropriate at this point as guidelines to reading through the rest of this chapter.

We will simply avoid the usual definitional morass by using the term "pornography" to refer to the range of sexually explicit materials used in the various studies reviewed here. In a number of studies, these materials have included sex education materials. In describing specific studies, we also will use the researcher's terminology of choice, but making sure that the stimulus materials are adequately described for the reader.

We also are sensitive to the limitations and strengths of specific research approaches and we have taken special efforts to review these briefly in each major section of this Chapter, if only to underscore the fact that our evaluation of the research recognizes these limitations and indeed proceeds from the assumption that any conclusions must be drawn on the basis of complementary or convergent data.

## Overview of the 1970 Commission Research Conclusions

The period prior to the creation of the 1970 Commission on Obscenity and Pornography was marked by a paucity of research on the effects of exposure to pornography (Cairns, Paul and Wishner, 1962). A Commission-sponsored review of the literature in 1970 later concluded that "we still have precious little information from studies of humans on the questions of primary import to the law . . . the data stop short of the 'critical point'. (Cairns, et al, 1970). Much of the Commission-sponsored studies thus constituted some of the earliest investigations on the issue of pornography.

The 1970 Commission funded over eighty studies to examine various aspects of pornography. Surveys included a national in-person survey of public attitudes toward and experiences with pornography (Abelson, et. al., 1970). A number of correlational studies examined social indicators of crime rates (Thornberry and Silverman, 1970; Kupperstein and Wilson, 1970; Ben-Veniste, 1970) while another cluster of studies investigated sex offenders and their previous experiences with erotica, patterns of exposure and self-reported arousal. Finally, another group of studies was commissioned (laboratory experiments) to examine causal links between exposure to pornography and effects (see Technical Reports of the Commission on Obscenity and Pornography, vols. 1, 6, 7, and 8, 1970).

The national survey findings (Abelson, et. al., 1970) showed that between two-fifths to three-fifths of the respondents believed then that sexually-explicit materials provided information about sex, were a form of entertainment, led to moral breakdown, improved sexual relationships of married couples, led people to commit rape, produced boredom with sexually-explicit materials, encouraged innovation in marital sexual technique and led people to lose respect for women (see comparison between 1970 survey findings and 1985 Gallup poll results below).

Experimental findings showed brief increases in sexual activities and fantasies after exposure to sexually-explicit materials but no significant alterations of established sexual behavioral patterns. The Commission further determined that there was no detectable relationship between availability of pornography and crime rates in the United States but suggested that removal of restrictions on pornographic material was correlated with lower sexual crime rates, as determined from Danish data prior to and after the removal of restrictions on pornography (Ben-Veniste, 1970; Kutchinsky, 1970, 1973).

The 1970 Commission concluded:

> . . . In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crimes or sex delinquency (p. 223).

The Commission's conclusions were challenged and a number of methodological issues were raised (Cline, 1974; Eysenck and Nias, 1980). At the very least, these conclusions were described as "premature" (see Liebert, 1976). Researchers who have done studies subsequent to the 1970 Report have also consistently identified a major flaw in the 1970 studies: the absence of any investigation of the effects of violent pornography.

On balance, however, the impetus for further research on the effects of exposure provided by the 1970 Commission cannot be overlooked. As the Effects Panel noted in its report,

> One of the contributions of the work of the Panel has been to place the dimensions of human sexual behavior on the agenda for continuing inquiry. By providing resources in terms of funds and technical guidelines, the Panel has helped to legitimate systematic inquiry into an area that heretofore has either been ignored or feared.

It is difficult to quarrel with this observation.

Since the 1970 Commission report, in fact, numerous research studies have been done exploring various aspects of the effects of pornography. Since 1970 the quantity and quality of the research has been impressive. While much remains to be explored, not only has the volume of studies conducted steadily increased, but the programmatic nature of the research conducted by various individuals and research teams has provided a better insight into understanding the various conditions under which certain effects may or may not occur.

Studies done for the 1970 Commission were hampered by time constraints. As the research director for the 1970 Commission pointed out, "most of the researchers had less than nine months in which to establish a research team, arrange a research setting, develop measuring instruments, secure subjects, collect the data, reduce the data, and write a report." (General Preface to Technical Reports, Commission on Obscenity and Pornography, 1970, p. vii)

Methodological advances in measurement procedures have also enhanced the reliability and validity of research instruments and findings. For example, measures of sexual arousal in some of the 1970 studies were based almost entirely on self-reports (e.g., Cook and Fosen, 1970; Goldstein, et. al., 1970; Davis and Braught, 1970). Since then, the poor correlation between self-reports of sexual arousal to sexually explicit stimuli and physiological measures of arousal has been well documented (Abel, Barlow, Blanchard and Guild, 1977; Blader and Marshall, 1984).

More recent studies have used instruments such as the penile plethysmograph (Malamuth and Check, 1980a), thermography procedures (e.g., Abramson, et. al., 1981) or the vaginal photoplethysmograph (see Sintchack and Geer, 1975; Hatch, 1979) to evaluate arousal (see also Geer, 1975; Heiman, 1977), or have combined physiological measures (e.g., blood pressure readings) with paper-and-pencil tests. Researchers have also attempted to validate paper-and-pencil measures, a critical methodological requirement (see, for example, Burt, 1980; Malamuth, In Press). Finally, more sophisticated statistical techniques have allowed for better data analysis, control, and interpretation. Multiple regression techniques, for instance, have allowed researchers to specify how much each explanatory variable contributes to change in the variable being measured. Various other statistical techniques have also helped in deciding whether correlational data give any credence at all to the possibility of causal linkages.

A final observation might be made with regard to stimulus differences between the 1970 studies and more recent ones. Stimulus materials used in the 1970 studies were obtained primarily from sex research institutes (the Institutes of Sex Research at Hamburg University in West Germany and at Indiana University) and the Bureau of Customs confiscated contraband collection. One researcher (Tannenbaum, 1970) resorted to producing his own film which he described as showing a young lady "going through the motions of disrobing in a fairly sensuous manner in apparent preparation for the arrival of a lover." These materials were also presented primarily in the form of slides, magazine pictorials, mimeographed passages and film.

It is perhaps as much a function of availability and changing technology that more recent studies have used as stimulus materials films, audiotapes, videos, and material from various "adult men's" magazines, all easily available from outlets as diverse as the neighborhood video store, the corner newsstand, or the local adult bookstore.

## Other Pornography Commissions and Social Science Research

Other organizations which have studied pornography such as the Williams Committee in England and the Fraser Commission on

Pornography and Prostitution in Canada have also examined social science research evidence on the effects of viewing pornography. (Report of the Committee on Obscenity and Film Censorship, 1979; Report of the Special Committee on Pornography and Prostitution, 1985).

The Williams Committee, working between 1977 and 1979, commissioned two reviews of the existing literature. One review examined the effects of viewing pornography (Yaffe and Nelson, 1979) and the other examined the effects of exposure to media violence (Brody, 1977). Both reviews highlighted the difficulties of studying human behavior and of understanding human motivations. The review of the effects of viewing sexually-explicit materials concluded that "there is no consensus of opinion by the general public, or by professional workers in the area of human conduct, about the probable effects of sexual material." The review on the effect of exposure to media violence similarly maintained that "social research has not been able unambiguously to offer any firm assurance that the mass media in general, and films and television in particular, either exercise a socially harmful effect, or that they do not."

The long track record of media violence research and anti-social behavior makes the latter conclusion somewhat surprising particularly since an opposite conclusion was arrived at by similar commission working under the direction of the Unite States Surgeon General in 1972, which had examined the effects o exposure to media violence (Surgeon General's Scientific Advisor

Committee on Television and Social Behavior, 1972).

The conclusions of the Williams Committee on the effects of viewing pornography may not be as surprising since much of the experimental work was published after 1978. It is not clear, however, how much value these studies would have had for the Williams Committee since its call for more research was predicated on the importance of studying "the human personality as a whole, rather than to specific questions about violent or sexual materials and their supposed effects." (p. 4) The Committee further appeared to give greater attention to correlational studies as it examined in considerable detail studies by Court (1977) and Kutchinsky (1973) The Committee was highly critical of Court's methodology but also pointed out that the Danish data did not lead to the conclusion that the availability of pornography resulted in a decrease in sexual offenses.

The Canadian Fraser Commission similarly sponsored a research review (McKay and Dolff, 1985) and concluded that "the research is so inadequate and chaotic that no consistent body of information has been established. We know very well that individual studies demonstrate harmful or positive results from the use of pornography. However, overall, the results of the research are contradictory or inconclusive." (Report of the Special Committee on Pornography and Prostitution, v. 1, p. 99).

The commissioned review was exceedingly critical of the research, maintaining that the studies in every aspect exhibited "conceptually cloudy thinking," that they were characterized by "blatant silliness" and had no integrating framework, that "the literature is rife with speculation and unwarranted assumptions." The low regard for behavioral science methods is evident throughout the review, with major criticisms focusing on the uselessness of the experimental paradigm (p. 86-87), and the inability to draw conclusions from correlational research. Despite this assessment, the Commission proceeded to recommend criminal sanctions for sexually violent material and child pornography and limits on public display for nonviolent pornography. These recommendations were based on the Commission's observations that these materials were contrary to Canadian values of equality and human dignity.

It is obvious that the contribution of social science findings to policy considerations can vary, from being the sole or primary basis for policy recommendations, as was the case for the 1970 Commission, to being close to irrelevant to such considerations, as seemed to be the case with the Canadian pornography commission.

## PUBLIC ATTITUDES TOWARD PORNOGRAPHY

How does the public view pornography and have there been any changes in public opinion in the last fifteen years?

Survey data from a national public opinion poll on the issue of pornography were made available to the Commission by *Newsweek* magazine. The poll was conducted for *Newsweek* by the Gallup organization in March, 1985, and involved a sample size of 1020 respondents interviewed by telephone.[1119]

Comparisons between the Gallup data, where appropriate, will be made with the 1970 Commission survey (see Abelson, et. al., 1970) to examine any observable change.

The 1970 Commission survey used face-to-face interviews from February through April of 1970 with a random sample of 2,486 adults and 769 persons ages fifteen to twenty (Abelson, et. al., 1970). For purposes of comparison with the 1985 sample, only the data from the adult sample for 1970 will be used. The Newsweek-Gallup poll was a telephone survey of 1,020 adults conducted in March, 1985.

The 1970 survey was a far more wide-ranging survey covering a host of areas including opinions on the effects of sexually-explicit material for which some directly comparable poll data are available from the Newsweek poll), the respondents' experiences with sexually explicit materials, opinions on different categories of sexual explicitness, attitudes toward legal and other forms of control, and attitudes toward different categories of sexual explicitness.

In contrast, the Newsweek-Gallup poll was much more limited, consisting of eight questions. For purposes of additional comparison, a 1977 national Gallup poll provides another trend point which allows comparisons with a 1985 question on the applicability of national versus local standards.

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[1119] Surveys such as this Gallup survey which employ "probability samples" are generally accurate within known limits. That is, the sample results can be applied to the population as a whole within the sampling tolerance ranges for a given sample size. For this survey sample size of 1020 respondents, sampling error is three percent. In practical terms, if we could contact every member of the population being described, the "real" percentage would be within plus or minus three percent of the observed percentage for the sample.

Any comparisons between the 1970 and 1985 findings should be made with caution, given the independence of both surveys and the fact that only a few questions were exactly alike. In those areas where questions were examining similar issues but were not worded the same, only the questions which were more narrowly defined for the 1985 survey were included and any resulting error would be on the side of conservatism. The distinctions between direct and indirect comparisons are carefully noted. A major objective is to note whether patterns observed in 1970 continue in 1985. Comparisons will be made in the three areas: (1) public exposure to sexually explicit materials; (2) perceptions of the effects of pornography; and (3) opinions on the regulation of pornography.

## 1. Public Exposure to Sexually Explicit Materials

The data from 1970 and 1985 are comparable only in a limited way because of differences in the materials mentioned and changes in technology (e.g., the widespread use of cable and home videos). In 1970, for instance, the respondents were asked if they had "ever seen stag movies or skin flicks". In 1985, respondents were asked whether they had gone to an X-rated movie or bought/rented an X-rated video cassette in the last year. The 1985 respondents were asked if they had "ever read" magazines like Playboy or Penthouse, while 1970 respondents were asked if they had seen or read a magazine "which you regarded as pornographic." Again, we note that this is a loose comparison, only afforded by the fact that the 1985 question is more specific in nature and, therefore, a more conservative estimate.

In response to the question whether they had seen or read a magazine "which you regarded as pornographic," one in five in 1970 said "yes," with twenty-eight percent of the men and fourteen percent of the women responding in the affirmative. However, half of the men and a third of the women in this group were unable to recall the title. Of those titles mentioned, it was clear that the term 'pornographic' embraced a wide variety of material including Cosmopolitan, Esquire, Good Housekeeping and Ladies Home Journal (Abelson, et. al., p. 23).

In contrast, two thirds of the 1985 respondents had read Playboy or Penthouse at some time. Over a third said they "sometimes buy or read magazines like Playboy" (37%) while thirteen percent said they "sometimes buy or read magazines like Hustler."

In 1970, fifteen percent of respondents said they had seen a movie they regarded as 'pornographic' in the past year. Again the range of titles mentioned included such films as Butch Cassidy and the Sundance Kid, The Graduate, Easy Rider, and Bonnie and Clyde, in addition to titles that could more likely fall in the "adult" movie category. On the other hand, less than ten percent (7%) of the 1985 respondents had been to an X-rated movie in the past year while close to one in ten (9%) had purchased or rented an X-rated video cassette. The marked difference between the questions asked at both time points precludes any conclusion about any increase or decrease in film viewing in the last fifteen years although the media for purveying adult films certainly has increased.

In 1970 as in 1985, men, younger individuals, and those with more education were more likely to have been exposed to sexually explicit material than women, older respondents, and those less educated (Tables 1 and 2). The differences in exposure between men and women are fairly large both in 1970 and in 1985 but are particularly striking in 1970.

At what age is the average person first exposed to sexually explicit materials? Abelson, et. al. (1970) found that about one in five males and about one in ten females had their first exposure by age twelve. By age seventeen, over half of the males (54%) and a third of the females had been exposed (p. 8). Those exposed earlier also tend to differ from those exposed at a later age. "Young adults, college-educated people, those with relatively liberal attitudes toward sex, and people who have experienced the most erotica recently are all disproportionately more likely than others to have had their first experiences with erotica at a young age" (p. 9).

No comparable age-of-first-exposure question was asked in the 1985 Newsweek-Gallup Poll. A few other studies have similarly examined these questions and the results may identify any changes which have occurred since 1970.

Gebhard (1980) compared data collected by the Kinsey Institute between 1938 and 1960 (using only the data from white males and females with at least some college education --a total of 4,388 respondents) to a much smaller nonprobability sample of undergraduate males and females in one university in 1975. By comparing responses to questions on age and source of first knowledge of such topics as coitus, pregnancy, fertilization, menstruation, and venereal disease. Gebhard concluded that "children and young people are learning the basic facts about sex at considerably younger ages than did their parents and grandparents" (p. 168).

For example, over half of each sex in the 1975 sample knew of coitus by age ten whereas only a third of the earlier sample's females and half of the males had this same knowledge at that age. By age eight, thirty-one percent of the males in the Kinsey sample knew of pregnancy compared to sixty-three percent in the 1975 sample; for females, it was thirty-one percent versus seventy-six percent, respectively.

A second finding of this study was that sources of early sex information appeared to have shifted slightly in relative importance. Same-sex peers remained the major source in both samples but to a lesser degree for the more recent sample, with mothers and the mass media becoming more significant (ranked second and third, respectively). These results, however, are simply suggestive because of the difficulty of generalizing beyond these particular groups of respondents and the limited size of the 1975 sample. These data also gave little indication of whether "mass media" includes pornography.

Another more recent set of data based on a national probability sample of 1071 respondents is available from Canada (Check, 1985). The Canadian results show that adolescents, ages twelve to seventeen, report most frequent exposure of sexually explicit fare. As Table 3 shows, two in five twelve to seventeen year olds view such material in movie theaters at least once a month; over a third (37%) see similar material on home videos with the same frequency.

These results should be viewed with caution because of the small numbers in this age group. The 1970 survey data demonstrated a similar pattern. Respondents in the 1970 sample were asked how many times during the past two years they had seen photographs, snapshots, cartoons or movies of a list of sexually explicit items. Adolescents reported more frequent exposure than adults, with three in ten of the adolescents saying they had seen such material six or more times in the last two years compared to one in four adult males and one in seven adult females.

In comparing his results to the 1985 American Newsweek-Gallup data discussed above for comparable questions, Check found parallel results at least for sexually violent material. Results on nonviolent fare could not be compared because of the differences in question wording. This consistency and the fact that over eighty percent of the sexually explicit material in Canada s from the United States (Special Committee on Pornography and rostitution, 1985, p. 161) might suggest that the Canadian esults may not be dissimilar from what might be found in the nited States.

## Table 1

### Previous Exposure to Sexually Explicit Materials, By Age and Gender: 1970 Commission Survey

| | 21-29 | 30-39 | 40-49 | 50-59 | 60+ |
|---|---|---|---|---|---|
| Men | | | | | |
| Yes, have seen stag movie | 54% | 55% | 44% | 43% | 27% |
| Yes, have seen skin flick | 49 | 28 | 22 | 12 | 6 |
| Women | | | | | |
| Yes, have seen stag movie | 17 | 12 | 13 | 5 | 1 |
| Yes, have seen skin flick | 15 | 10 | 6 | 4 | 1 |

N = 2482

Question: "There are some movies called stag movies or party movies. These are not shown in regular theaters, but are shown in private homes or private parties or at club meetings. Have you ever seen stag movies or party movies of this kind?"

Question: "Nearly every city has one or more theaters that specialize in showing movies that feature a lot of nudity and suggestions of sexual activity. These movies are sometimes called 'skinflicks'. Have you ever seen these kinds of films?"

Table 13, Abelson, et. al., 1970, p. 17)

## Table 2

## Exposure to Sexually Explicit Material, By Age, Gender, and Permissiveness: 1985 *Newsweek*-Gallup Survey

| | Men | | | | |
|---|---|---|---|---|---|
| | 18-20 | 30-49 | 50+ | Standards Stricter | Standards Less Strict |
| Ever read *Playboy* or *Penthouse* | 91% | 92% | 70% | 77% | 88% |
| Sometimes buy/read magazines like *Playboy* | 63 | 58 | 29 | 29 | 61 |
| Sometimes buy/read magazines like *Hustler* | 28 | 24 | 11 | 11 | 26 |
| Went to X-rated movie in past year | 12 | 9 | 6 | 3 | 12 |
| Bought/rented X-rated video cassette in past year | 17 | 14 | 4 | 7 | 13 |

| | Women | | | | |
|---|---|---|---|---|---|
| | 18-20 | 30-49 | 50+ | Standards Stricter | Standards Less Strict |
| Ever read *Playboy* or *Penthouse* | 64 | 62 | 28 | 41 | 61 |
| Sometimes buy/read magazines like *Playboy* | 40 | 32 | 5 | 18 | 31 |
| Sometimes buy/read magazines like *Hustler* | 15 | 5 | 0 | 3 | 8 |
| Went to X-rated movie in past year | 14 | 4 | .3 | 3 | 8 |
| Bought/rented X-rated video cassette in past year | 12 | 8 | .9 | 4 | 10 |

N = 1020

### Table 3

### Frequency of Viewing Sexually Explicit Films in Movie Theaters and on Videos, By Age (Canadian National Sample)

| | Movies | | | |
|---|---|---|---|---|
| | 12-17 | 18-34 | 35-49 | 55+ |
| Never | 28% | 34% | 48% | 74% |
| 1-2 times/yr | 22 | 44 | 35 | 12 |
| 1/mo. or more | 39 | 12 | 7 | 4 |

| | Videos | | | |
|---|---|---|---|---|
| | 12-17 | 18-34 | 35-49 | 55+ |
| Never | 32 | 33 | 50 | 83 |
| 1-2 times/yr | 22 | 37 | 25 | 7 |
| 1/mo. or more | 37 | 23 | 20 | 5 |

N = 1071

Note: "Don't Know"/No Response not included

(Check, 1985)

Public Standards of Acceptability

The 1970 Commission survey examined standards of acceptance for various categories of explicitness in two types of media: movies and print. Table 4 shows that there was slightly greater tolerance for sexual explicitness in the print media than in movies (if one compares the percentages of persons advocating total bans on various categories). The print category presents a problem since it does not distinguish between textual and visual or photographic material, which might be found more often in books and magazines, respectively. Restrictiveness also progressively increases the more the behavior departs from what respondents might consider normative. A reanalysis of the 1970 survey data does confirm this observation of acceptability based on perceived normativeness and, in addition, showed that judgments were also related to community size and medium (Glassman, 1978).

In 1985, slightly different distinctions appear to be made (Table 5). Greater tolerance is shown for film (both theater and video tape cassettes) than for print, with the public more likely to suggest no restrictions for the former. While the survey does not use the wider range of distinctions of sexual activities provided 1970 respondents (a limitation imposed no doubt because of the telephone procedure), the three categories used nudity, sexual relations, and sexual violence provide a sufficient diverse range of themes. The data clearly show greater tolerance for nudity, with a majority maintaining that restrictions should only apply to public display. There was least tolerance for sexual violence, with a majority advocating banning such material. What has been called the "VCR morality" is also very much in evidence here with more than a quarter of the respondents opting for no restrictions on X-rated video tape cassettes. Nearly one in four respondents did not object to the sale or rental of video cassettes featuring sexual violence as long as there is no public display.

These differences are clarified further when one takes into account the respondent's age and gender (Table 5). The young are clearly less opposed than the old, and men more than women, these patterns appearing with fairly high consistency.

There also appears to be some interaction between these demographic characteristics. Greater numbers of older men tend to be more permissive than older women, with about twice as many men over fifty suggesting no restrictions on materials across the board. The gap between men and women narrows significantly among younger respondents (those between eighteen and twenty-nine), with women just as likely as men to favor no restrictions on all materials except magazines with nudity and the sale or rental of videocassettes. Men were more likely to favor no restrictions on these materials than women.

Has there been an increase in permissiveness in the last fifteen years? Again, while some of the categories between 1970 nd 1985 are not directly comparable, a reasonable comparison can e made for the category describing depictions of sexual intercourse. For the 1970 sample, only four percent advocated n restrictions on depicting intercourse in books and magazines an the same percentage advocated no restrictions for movies as well In 1985, twelve percent advocated no restrictions on "magazine that show adults having sexual relations." Twenty percen favored no restrictions on "theater showings of X-rated movies. The assumption we make here, of course, is that most responden associate X-rated movies with depictions of sexual intercour but these comparisons are made with this caveat in mind. Wi the exception of sexual violence in magazines, the percentag opting for no restrictions on various categories of materials a also higher in 1985 than in 1970.

Finally, the 1985 sample was asked whether there should b single nationwide standard or whether local community standa should be applied. Comparable data collected by the Gallup p in 1977 provides another data point. As Table 7 shows, resp dents in 1985 were almost evenly divided on whether a national community standard should be used (forty-seven percent ver forty-three percent). The numbers who prefer to see lo community standards applied have remained about even in 1977 1985 -- about four in ten respondents. There were as many indicated standards should be stricter in 1977 as in 19 forty-five percent versus forty-three percent. Additi analysis shows that those who indicated standards shoul stricter were more likely than those who said standards shoul less strict to favor application of a national standard (55

41%). Six in ten women were also likely to favor a stricter standard compared to four in ten men.

In the last year, this gap between men and women appears to have increased even more on the issue of restrictiveness. A Washington Post-ABC News survey in February, 1986[1120] asked the question: "Do you think laws against pornography in this country are too strict, not strict enough, or just about right?" Among men, ten percent said they were about right, forty-one percent said they were not strict enough, and forty-seven percent said they were about right. Among women, on the other hand, only two percent said the laws were too strict, while seventy-two percent -- seven in ten women -- maintained they were not strict enough. Almost a quarter (23%) said they were just about right.

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[1120] The Washington Post-ABC News poll was conducted February 6 - 12, 1986 by telephone among 1,504 men and women nationwide. The margin of error is plus or minus three percentage points.

## Table 4

### Public Permissiveness, by Medium and Content: 1970

| | In Movies | | | In Books, Magazines | | |
|---|---|---|---|---|---|---|
| | Total Ban | Some Rest. | No Rest. | Total Ban | Some Rest. | No Rest. |
| Sex organs showing | 45% | 46% | 5% | 41% | 47% | 7% |
| Intercourse | 50 | 42 | 4 | 48 | 44 | 4 |
| Activities with same sex | 62 | 31 | 3 | 58 | 34 | 4 |
| Oral sex | 62 | 30 | 3 | 58 | 33 | 4 |
| Whips, belts | 65 | 26 | 4 | 60 | 30 | 5 |

Question: On top of this card are descriptions of sexual material sometimes shown in movies in regular theaters (found in printed material). On the bottom of the card are some opinions about who it is all right to admit to movies showing such material. (These could be stories in books, magazines, paperback books, or on typewritten pages) For each description on top, tell me which, if any, group on the bottom it is all right (to admit to these movies) (for the material to be available).

Key: A - None. There is no one it is all right to admit.
B - It is all right to admit people like me but not others.
C - It is all right to admit adults 21 and over but not persons under 21.
D - It is all right to admit persons 16 or older but not persons under 16.
E - It is all right to admit anyone who wishes to be admitted.

(Appropriate variations in Key made for Print version)

For categories used above,
A = Total Ban
B, C & D = Some Restrictions
E = No Restrictions

(Reconstructed from Tables 120 and 122, Abelson, et. al.,1970, pp. 102-103)

Table 5

Public Permissiveness, by Medium and Content: 1985

*Newsweek*-Gallup Survey

| | Totally Banned | No Public Display | No Restrictions |
|---|---|---|---|
| Magazines that show nudity | 21% | 52% | 26% |
| Magazines that show adults having sexual relations | 47 | 40 | 12 |
| Magazines that show sexual violence | 73 | 20 | 6 |
| Theater showings of X-rated movies | 40 | 37 | 20 |
| Theater showings of movies that depict sexual violence | 68 | 21 | 9 |
| Sale/rental of X-rated video cassettes for home viewing | 32 | 39 | 27 |
| Sale/rental of video cassettes featuring sexual violence | 63 | 23 | 13 |

Question: For each item that I read, tell me if you feel it should be totally banned for sale to adults, sold to adults as long as there is no public display, or should be sold to adults with no restrictions?

## Table 6

## Medium, Content Type, and Level of Restriction - Comparisons by Gender and Age: 1985 *Newsweek*-Gallup Poll

A. Materials Should be Totally Banned

| | Men | | | Women | | |
|---|---|---|---|---|---|---|
| | 18-29 | 30-49 | 50+ | 18-29 | 30-49 | 50+ |
| Magazines - nudity | 6.6% | 9.1% | 29.9% | 14.8% | 20.6% | 41.2% |
| Magazines - adults having sexual relations | 26.8 | 35.6 | 57.2 | 31.6 | 49.6 | 76.2 |
| Magazines - sexual violence | 57.7 | 73.1 | 71.7 | 61.9 | 81.3 | 87.2 |
| Theaters - X-rated movies | 28.7 | 22.2 | 46.7 | 27.0 | 39.0 | 69.0 |
| Theaters - sexual violence | 57.7 | 63.1 | 68.4 | 53.3 | 75.2 | 85.2 |
| Sale/rental - X-rated video cassettes | 17.6 | 19.1 | 42.8 | 20.9 | 31.5 | 54.8 |
| Sale/rental video cas. w/ sexual violence | 47.8 | 60.0 | 62.8 | 49.2 | 69.6 | 78.8 |

Table 6 (cont.)

B. No Public Display of Materials

| | Men | | | Women | | |
|---|---|---|---|---|---|---|
| | 18-29 | 30-49 | 50+ | 18-29 | 30-49 | 50+ |
| Magazines - nudity | 50.7% | 59.1% | 43.8% | 63.9% | 54.0% | 41.2% |
| Magazines - adults having sexual relations | 52.6 | 49.7 | 32.6 | 53.3 | 37.9 | 18.6 |
| Magazines - sexual violence | 32.4 | 17.5 | 21.1 | 30.7 | 13.4 | 10.1 |
| Theaters - X-rated movies | 40.4 | 48.4 | 30.3 | 46.3 | 40.7 | 17.7 |
| Theaters - sexual violence | 27.9 | 23.1 | 18.4 | 35.7 | 16.7 | 8.7 |
| Sale/rental - X-rated video cassettes | 39.7 | 43.8 | 29.9 | 50.4 | 43.2 | 28.7 |
| Sale/rental video cas. w/ sexual violence | 33.1 | 24.1 | 18.8 | 35.7 | 17.5 | 13.0 |

Table 6 (cont.)

C. No Restrictions on Materials

| | Men | | | Women | | |
|---|---|---|---|---|---|---|
| | 18-29 | 30-49 | 50+ | 18-29 | 30-49 | 50+ |
| Magazines - nudity | 41.5% | 30.0% | 25.0% | 21.3% | 24.0% | 16.2% |
| Magazines - adults having sexual relations | 19.1 | 14.7 | 9.9 | 14.3 | 11.7 | 4.3 |
| Magazines - sexual violence | 7.7 | 9.1 | 5.6 | 7.4 | 5.6 | 2.6 |
| Theaters - X-rated movies | 25.0 | 27.8 | 19.7 | 23.8 | 16.2 | 9.6 |
| Theaters - sexual violence | 11.8 | 12.2 | 10.2 | 9.8 | 6.1 | 3.5 |
| Sale/rental X-rated video cassettes | 40.1 | 36.6 | 25.0 | 28.3 | 24.5 | 12.8 |
| Sale/rental video cas. w/ sexual violence | 18.4 | 15.6 | 15.1 | 14.3 | 12.3 | 6.7 |

## Table 7

## Application of Standards to Obscenity/Pornography

National versus local standards:

| | 1977 Gallup Poll | 1985 Gallup Poll |
|---|---|---|
| ational standard | 45% | 47% |
| munity set own standard | 39 | 43 |
| uldn't be any (volunteered) | 9 | 5 |
| 't know | 7 | 5 |

stion: In determining whether a book, magazine or movie is scene, do you think there should be a single, nationwide ndard or do you think each community should have its own ndard?

Change in Standards:

| | 1977 Poll | 1985 Poll |
|---|---|---|
| ould be stricter | 45% | 43% |
| ould be less strict | 6 | 4 |
| pt as they are | 35 | 48 |
| n't know | 14 | 5 |

stion: Do you think the standards in your community regarding e sale of sexually explicit material should be stricter than ey are now, not as strict or kept as they are now?

Perceptions of Pornography's Effects

Respondents are just as likely in 1985 as in 1970 t
perceive both positive and negative effects from exposure to
use of sexually explicit materials (Table 8). However, there
a significant increase in the numbers who perceive negati
effects from 1970 to 1985. 1970 and 1985 data in this case we
directly comparable since the same categories of effects we
used.

The most significant changes were in the areas of viole
toward women, with the number of respondents indicating th
materials could lead some people to lose respect for wo
increasing from forty-three percent to seventy-six percent
those believing they lead some people to commit rape or se
violence increasing from forty-nine percent to seventy-th
percent in 1985. Whether this reflects greater sensit
toward women or greater consciousness of sexually vio
material available or both is unclear. A slightly greater nu
in 1985 than in 1970 were also likely to think that sexu
explicit materials provide a safe "outlet for people with s
problems" (34% to 27%) while the number of people who agreed
these could help improve the sex lives of some married co
remained the same (47%).

## Table 8

## Perceptions of Effects of Pornography - 1970 and 1985
(Percent Saying "True")

| | 1970 | 1985 |
|---|---|---|
| They provide information about sex | 61% | 52% |
| They lead some people to commit rape or sexual violence | 49 | 73 |
| They provide a safe outlet for people with sexual problems | 27 | 34 |
| They lead some people to lose respect for women | 43 | 76 |
| They can help improve the sex lives of some couples | 47 | 47 |
| They provide entertainment | 48 | 61 |
| They lead to a breakdown of morals | 56 | 67 |
| (Base) | (2486) | (1020) |

Question for 1985: "Thinking of sexually explicit magazines, movies, video cassettes, and books, tell me if you believe the following are true or not true:"

Question for 1970: "On this card are some opinions about the effects of looking at or reading sexual materials. As I read the letter of each one, please tell me if you think sexual materials do or do not have these effects." Item choices provided the 1970 respondents were worded in the same way or were reasonably similar: "Sexual materials provide information about sex;" ". . . lead people to commit rape;" ". . . give relief to people who have sex problems;" ". . . improve sex relations of some married couples;" ". . . provide entertainment;" ". . . lead to a breakdown of morals." The 1970 survey had five additional items not included here since these were not utilized by the 1985 Newsweek poll.

## Public Perception of Pornography as a Social Problem

1970 respondents were asked to name "what you think are the two or three most serious problems facing the country today?" At the height of the Vietnam War, not surprisingly, more than half named this event the most important issue, followed by racial conflict and civil rights, and thirdly, by the economy (36% and 32%). Only two percent said they were concerned about erotic materials. The 1985 Gallup survey asked the question of perceived importance in a different way: by evaluating the problem relative to other social problems and asking the respondent to judge whether progress was being made to solve these problems (see Table 9).

## Table 9

## Perception of Pornography as a Social Problem (1985)

| | Making Progress | Losing Ground | Staying About same | Don't Know |
|---|---|---|---|---|
| a)Preventing violent crime | 19% | 37% | 42% | 2% |
| b)Stopping drug addiction | 28 | 42 | 26 | 4 |
| c)Controlling porn. | 20 | 33 | 38 | 9 |
| d)Dealing w/ air pollution | 38 | 20 | 36 | 6 |

Question: I am going to name a number of problems facing the nation. For each, tell me if you feel this is a problem on which we are making progress, losing ground, or staying about the same.

pages tightly bound

**Summary**

There is greater overall public tolerance for sexually explicit materials. However, public opinion on restrictiveness clearly differentiates among different media, content depictions, and public access to such materials. There is a preference for no public display of materials featuring nudity and nonviolent sexual activities whereas a majority favor banning materials that depict sexual violence. There is also a greater willingness to impose restrictions on theater showing and magazine publication of sexual activities than on home videos.

The most frequent exposure to pornography is reported by adolescents between twelve to seventeen, a finding reported by the Canadian as well as the 1970 Commission survey. While sexual knowledge appears to be acquired at younger ages, it remains unclear what role pornography plays in this "sex education" process.

Finally, the public perceives both beneficial as well as harmful effects from exposure to sexually explicit materials. Some maintain these materials help improve sex lives of some people, that they provide information about sex, and also provide entertainment. A significant number also feel they lead to a loss of respect for women, a breakdown of morals, and the commission of sexual violence. The changes between 1970 and 1985 are most apparent in the increase in the numbers who perceive that exposure to these materials lead to loss of respect for, and the commission of sexual violence against, women.

## SEX OFFENDERS AND PORNOGRAPHY

A common contention is that exposure to pornography leads to the commission of sex offenses. There are two ways one can examine this contention: (1) by looking at the relationship between sexual offense statistics and the availability of pornography, and (2) by examining interview data from sex offenders, investigating the mechanics behind the onset of deviancy and the role of pornography in the commission of sex crimes.

The examination of aggregate social indicators of pornography availability and sexual offense statistics provides another view of the potential relationship between pornography and these offenses. It offers another way of validating results of the laboratory studies or from individual surveys. For example, if the results indicate a higher incidence of sexual aggression in the laboratory studies as a consequence of exposure to particular types of stimuli, and if surveys reveal that individuals who report higher levels of exposure to similar materials also tend to exhibit higher levels of sexual aggression, and if these findings are corroborated with a correlation between aggregate measures of availability and offenses, then we have reason to be more confident in an assertion that exposure to the class of materials in question has a substantial relationship to sexual aggression.

In the case of sex offenders, a comparison of their arousal patterns to those of nonoffender groups is vital, particularly as these patterns correlate with sexual aggression and attitudinal measures. It is reasonable to suggest that findings among nonoffender males who are aroused to coercive sexual themes and who also tend to be more sexually aggressive would be more meaningful if matched by similar patterns among those identified as sex offenders.

From the perspective of the offenders and society as well, understanding their behaviors is critical because of the social costs in terms of victimization. While the number of sex offenses reported by incarcerated sex offenders appears to be small, results of clinical interviews, conducted with outpatient sex offenders (with great lengths taken to assure confidentiality) reveal that the number of crimes committed by the average sex offender is far greater than generally has been estimated (Abel, Mittelman, and Becker, 1985). Data from two psychiatric clinics obtained from 411 sex offenders revealed a staggering number of multiple victimizations per offender. These offenders attempted an average of 581 sex offenses and completed typically about 533 offenses each, with a mean number of 336 victims each. These attempted or completed offenses were over an average period of twelve years (Abel, Mittelman and Becker, 1985).

## Aggregate Indicators: The Incidence of Sex Offenses and Pornography Availability:

One of the most frequently cited studies has been the analysis of sex crimes in Denmark before and after the legalization of pornography in the 1960s (see Kutchinsky, 1973; Ben-Veniste, 1970). Kutchinksy's data showed a drop in the number of reported sex crimes after legalization and he argued that the availability of pornography is cathartic as it siphons off potentially dangerous sex impulses -- the "safety valve theory" (Kutchinsky, 1970, p. 288; Kutchinsky, 1973). Kutchinsky's work was lauded by the British pornography commission (Williams, 1979) for its thoroughness and the restraint with which he interpreted his findings. It singled out the dramatic reduction in offenses against children coinciding with the availability of pornography and, while the Commission did not endorse the "safety valve" hypothesis, agreed that Kutchinsky's interpretation was plausible, absent any other likely factor (p. 84).

On the other hand, Kutchinsky's study and conclusions did not go unchallenged. First, the weight of empirical evidence amassed in the last two decades by social psychologists, particularly in the area of media violence and aggressive behavior, hardly supports catharsis (see Weiss, 1969; Geen and Quanty, 1977; Bandura, 1973; Bramel, 1969; Comstock, In Press; NIMH, 1982).

Second, a number of problems have been raised with Kutchinsky's analysis and interpretations (see Cline, 1974; Bachy, 1976; Court, 1977; Baron, 1984; Malamuth and Billings, 1985). Some of these problems included the lumping together of sex offenses masked a stable, if not an increased, rape rate (Cline, 1974; Court, 1984). Also, such crimes as voyeurism were no longer recorded by police. Kutchinksy (1973) also noted that other activities such as homosexuality were simply tolerated more and certain social changes such as earlier sexual experiences for females meant reduced reports of intercourse with minors (Bachy, 1976).

The problem of using aggregate social indicators such as crime reports is well illustrated not just with reliability problems in reporting, but also in differential use of the data. For example, by Bachy's (1976) review of Copenhagen rape statistics between 1965 and 1974 which showed increases in rape and attempted rape as a proportion of total sex offenses. These offenses included intercourse with minors and indecent exposure, in addition to rape and attempted rape. Court's (1984) analysis of rape statistics for Copenhagen showed a similar upward trend while a fluctuating pattern was demonstrated by Kutchinsky's figures for the same crime in the same city between 1965 and 1970.

More recently, Kutchinsky (1985) has maintained that the increased availability of "hard-core" pornography in Denmark "may have been the direct cause of the real decrease in incidents of peeping and child molestation" (p. 313) and has proposed the "substitution" hypothesis as the most likely explanation. He further cites a similar pattern in West Germany with legalization of pornography in 1973 bringing about a decrease in sex offenses against children. This proposed causal link should be viewed with extreme caution, particularly since pornography availability statistics have not been presented.

Other data are available that allow further cross-cultural comparisons. Abramson and Hayashi (1984), in analyzing pornography in Japan, noted that while it was illegal to show pubic hair and adult genitals in sexually explicit stimuli, pornography appeared to be widely available in this country, including the prevalence of bondage and rape as recurring themes. In terms of rape statistics, however, they concluded that a low incidence of rape appears to be the case and suggested that certain socio-cultural mediating circumstances may be involved. Unfortunately, no data are provided by Abramson and Hayashi on availability or rape rates and at least one study indicates that these rates may actually be increasing. Goldstein and Ibaraki (1983) found that while crime rates have decreased or remained relatively stable among adults, juvenile crime increased from twenty-three percent of all crimes in 1976 to forty-two percent in 1980, occurring mainly in violent crime categories, including rape. The unique character of rape in Japan is also evident from these authors' findings that fifty-seven percent of the total reported rapes are group-instigated and seventy-five percent are committed by juveniles. Finally, an informal survey reported in this study showed that ninety percent of the women interviewed said they would not report the rape to the police if they had been victimized (p. 317-318).

Other cross-national data from areas as disparate as England, Australia, Singapore, and South Africa were analyzed by Court (1977, 1982, 1984). His studies compared rape rates in countries or areas where pornography is widely available, and those where restrictions exist. On the basis of his findings, Court advanced the propositions that (1) rape reports have increased where pornography laws have been liberalized while the same steep rise is not in evidence where restrictions exist; (2) intermittent policy changes or changes in the law are temporally related to changes in the rape rates; (3) the increase in rape reports does not parallel the increase in serious nonsexual offenses.

While Court's data are intriguing, the case he presents is weakened by (a) the selective use of a small number of countries, and (b) the lack of direct correlational analyses between sexual offense statistics and pornography distribution/circulation figures. The Williams Committee in England (Williams, 1981), in fact, took exception with Court's data, pointing out that he did not take into account the rise of crime in general in England (p. 74) and that the rising trend in rape and sexual assaults started well before what Court determined was the date marking the availability of pornography (p. 76; see Court, 1980, 1985 for responses to the Williams Report). Cocrane (1978) has similarly disputed Court's analysis and interpretations.

Kupperstein and Wilson (1970) of the 1970 Commission staff examined the incidence of sex crimes in the United States and reported that the rise in adult sex crimes (using report and arrest data) was not greater than the rise for other offenses between 1960 and 1969, despite the heightened availability of sexually oriented materials. The two indicators used for the latter were the circulation of Playboy magazine and the number of complaints reported to the United States Post Office for unsolicited sexually oriented mail. The study employed fairly crude measures, simply examining the percentage increase for various sexual and nonsexual offenses.

On the whole, a number of methodological problems characterize some of these early studies: first, the availability of pornography was simply assumed to have increased or decreased following legal changes. Second, direct correlations between the volume of pornography and sexual offense rates were not investigated. Third, sexual offenses were combined, masking important differences between various categories of offenses. Finally, the mediating effects of other variables which could affect the relationship between the circulation of pornography and sexual offense rates were not systematically investigated.

More recently, correlational evidence using more detailed statistical analyses, presents some additional insight into the pornography-sex crimes relationship on the aggregate or societal level in the United States (Baron and Straus, 1985). A fifty-state correlational analysis of rape rates and circulation rates of adult magazines was conducted, using aggregate circulation rates (subscription and newsstand sales per 100,000 population), for eight magazines (Chic, Club, Gallery, Genesis, Hustler, Oui, and Playboy, and Penthouse). A fairly strong correlation -- +.64 -- was found between these circulation rates and rape rates. This relationship was present even with controls for potential confounding variables such as police practices (measured by police expenditures per capita), propensity to report rape (measured by number of rape crisis centers per 100,000 females; NOW membership per 100,000 females; MS magazine circulation per 100,000 females; and number of battered women's shelters); "southernness" (based on the higher violent crime rates in the South), and "illegitimate opportunities" (referring to greater opportunities to commit crimes in warmer than colder periods; the indicator used was average temperature).

Baron and Straus further found that rape rates are negatively correlated with the status of women when other factors are controlled for. This status-of-women index was measured via economic, political and legal indicators such as women's median income as a percentage of men's; the percentage of female members in the state legislature; and existence of laws giving women the same property rights as men. The study concluded that in a male-dominant society, the lower status of women may be reflected in higher rape rates.

Since it is possible that rape rates also may be a function of the overall culture supporting legitimate violence (that is, the societal endorsement of the use of physical force for socially approved ends, such as crime control or order in schools), the relationship between this factor and rape rates was also examined. Using a twelve-measure index that included such figures as violent television viewing, hunting licenses issued, and use of corporal punishment, no significant association between legitimate violence and rape was found. It is still theoretically possible that rape rates may be influenced indirectly by the level of legitimate violence through the latter's inverse relationship with the status of women; that is, cultural support for violence may contribute to sexual inequality which, in turn, may increase the risk of rape.

Finally, the level of social disorganization was also found to be directly related with rape rates and to affect these rates indirectly through its association with the circulation of pornography and the status of women. Other factors found to correlate with rape rates were the extent of urbanization, economic inequality, and unemployment.

In comparing the relative influence of these various explanatory variables, it was found that the proliferation of sexually explicit magazines and the level of urbanization help explain more of the variation in rape rates than social disorganization. The latter is also "more influential" in predicting rape than are economic inequality, unemployment, or sexual inequality. Together, these six explanatory factors explain eighty-three percent of rape rate variations, certainly a considerable proportion of the variance.

A follow-up study by Jaffee and Straus (1986) examined the impact of a variable called "sexual liberalism" on the relationship between these sexually explicit magazines' circulation rates and rape rates. It was hypothesized that a more liberal sexual climate might explain the relationship between sexually explicit magazines' circulation rate and rape by encouraging men to purchase more of these magazines and also encourage more women to report rape to the police. An index based on twenty-two questions in a national survey measuring attitudes toward a variety of sexual issues was utilized as the measure for "sexual liberalism." Results showed that the original relationship between rape rates and circulation rates of sex magazines was non-spurious and that sexual liberalism played a minor role, accounting for only nine percent of the state-to-state rape rate variations. A problem with this study, however, is that it attempts to match individual-level measures of attitudes with aggregate-level social indicators, using data from forty states for the former (effectively reducing the original sample size of fifty states by a fifth).

Using the Baron and Straus data set, Scott and Schwalm (1985) essentially confirmed the sex magazine-rape rate relationship although their additional analysis showed that when rape rates were correlated with specific magazines, these correlations were higher for Playboy, Penthouse, and Oui than they were for Hustler magazine. Their contention was that sexual content in Hustler magazine was more likely to be associated with rape since this magazine has more sexually violent material than the other three magazines. Since correlations with the other four magazines were not provided, it is difficult to judge the consistency of such a pattern. Furthermore, such a breakdown is again not very helpful since the level of analysis is aggregate rather than individual. Thus, on an individual level, it will be more meaningful to correlate an individual's scores on sexual aggression measures and that individual's readership of specific magazines; on an aggregate level, it is more appropriate to relate the aggregate offense rate with aggregate availability figures for the material in question. And even on the individual level, there may still be some question as to the actual separability of individual magazine readership. A readership survey conducted for Hustler magazine among its subscribers shows that on average, the typical subscriber reads 3.6 adult men's magazines (Readex, 1984).[1121]

Scott and Schwalm (1985) also analyzed the effect of three additional variables not investigated by Baron and Straus: the effect of circulation rates of general circulation magazine (e.g., Time, Readers' Digest) and the effect of outdoor men' magazines (e.g., Field and Stream, American Rifleman), the latte using the presumption that an indicator of a "macho" environmen could also account for rape rates. Alcohol consumption for eac state was also examined. None of these variables wa significantly related to rape rates.

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[1121] The READEX survey was part of the public record a part of a court case involving Hustler magazine (Herceg Hustler, Inc.).

Scott (1985) further examined the correlation between adult theaters and rape rates for 1982 and found no relationship to exist. It is quite possible that this finding may be an artifact of the decreasing number of adult theaters in this country as a result of the rise of home videos, as Scott himself pointed out (see also Newsweek, 1985; Knowledge Industries, 1985). He also correlated the number of adult bookstores in each state and rape rates and again, found no relationship. Scott's data may not necessarily be inconsistent with Baron and Straus'. It is quite conceivable that the number of stores may not correlate with rape rates but the actual circulation of the magazines in various outlets do. In any case, Scott's endorsement of the "safety valve" or catharsis hypothesis on the basis of his findings appears premature at the very least.

While Baron and Straus' work is impressive for its methodological care and thoroughness, their findings do not indicate that men are induced to rape as a result of exposure to these magazines. While this is certainly plausible, there are two caveats to their analysis. First, it is a macro-model that is being tested, examining the relationship of various social-cultural factors on rape. Second, given that this is a correlational study, there is always the possibility that there may be some third factor influencing the observed sex-magazine

rape rate relationship.[1122] The crucial causal evidence has
come from an examination of the relationship under controll
conditions, and these studies are discussed below und
"Experimental Findings."

On an individual level, some parallel is offered the Bar
and Straus data by a recently completed large-scale study
sexual assault among the college student population (Koss, 198
Correlates of sexual victimization and sexual aggression we
examined among 6,000 college students from a probability sam
of higher education institutions. This study established
relatively high incidence of sexual assault within t
population (336 per 1,000 college women, a rate which inclu
rape, attempted rape, and forceful sexual contact). The portr
of college men who report behavior that meets legal definiti

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[1122] Baron and Straus recently conducted additio
analysis of their data by introducing a "Violence Appro
Index," based on attitude measures from the general Soc
Survey. By introducing this into their original equation,
relationship between the sale of sex magazines and r
disappeared. While this could offer some tentative support
the authors' contention that a "hypermasculine" climate migh
responsible for rape rates, rather than sex magazines per
they are also appropriately cautious about the severe limitat
of this particular finding. They point out that while
Violence Approval Index correlates in expected fashion with
percent males in the population, the percent of the populatio
the high-violence age group of eighteen to twenty-four, with
Legitimate Violence and Social Disorganization indices, it
has an unexpected negative correlation with the percent si
males in the population and has a low correlation (.23) with
rape rate. Second, the data are restricted to forty st
which, in combination with the addition of still another vari
to the equation, increases the standard error. Until t
problems are sorted out, the impact of this variable will hav
remain speculative. It is presumably for this reason that
authors included this information in a footnote rather tha
their text, and we likewise do so.

of rape shows individuals who are sexually experienced, come from homes where family violence was normative, who use alcohol fairly regularly (and reported becoming intoxicated one to three times per month), who regularly discuss with their peers "how a particular woman would be in bed," and who frequently read at least one of the widely available men's magazines.[1123]

While these results offer correlational evidence, again, they do not support any causal link between readership of such magazines and sexually aggressive behavior. There are a variety of factors that correlate with sexual aggression as this study and the Baron and Strauss (1986) study demonstrate. Both also provide an important contribution towards our understanding of the types of factors, social, cultural, situational, and individual, which interact to explain sexually aggressive behavior as the theoretical thinking behind it.

In the case of causal relationships, the demonstration of a statistical relationship (that is, that the probability of the observed relationship being due to chance is minuscule) is a first requirement. A second requirement is that other competing or alternative explanations have been controlled for to establish

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[1123] The question used by Koss (1986) in this survey as a measure of pornography exposure was:

How often do you read any of the following magazines: Playboy, Penthouse, Chic, Club, Forum, Gallery, Genesis, Oui, or Hustler? (check one):

__________ Never
__________ Seldom
__________ Somewhat frequently
__________ Very frequently

that X indeed causes Y.

In the case of rape rates and circulation rates of adult magazines, establishing a significant correlation between the two is a first step. That such a relationship may in fact be a spurious one due to the existence of some third factor is a second step in establishing the validity of the relationship. Unlike experimental situations, however, where most "alternative factors" are controlled for by randomly assigning subjects to experimental conditions, one has to be able to identify every potentially significant "third factor" in correlational research and actually account for these in the analysis. Therefore, we find ourselves at most in the position of accepting an observed relationship as being plausible but yet cannot fully preclude the possibility of its being spurious.

## Evidence from Sexual Offenders

There are three levels by which sex offenders' use of pornography can be evaluated: first, what are the patterns of their early exposure to pornography? Second, what is the role of pornography in their fantasy and arousal behaviors? Third and most critical, is the question of the role of pornography in the commission of their sex offenses.

Methodological Considerations. A number of elements need to be considered in the study of sex offender populations.

1. Nature of the population evaluated.

The deviant populations most accessible to researchers in the past were incarcerated sex offenders. This category thus constituted the samples described in earlier studies, including the significant pioneering surveys done by Gebhard, et. al. (1965) and Goldstein, et. al. (1970). There is evidence, however, that data provided by incarcerated offenders tends to vary significantly from non-incarcerated groups (Abel, Becker and Skinner, 1985). The demographic profile of incarcerated offenders, for instance, appears to differ from nonincarcerated groups. For example, Goldstein, et. al. (1970) found that while forty-two percent of his control sample had some college education, only twenty-six percent of the rapists, twenty percent and five percent of the male-object and female-object pedophiles, respectively, also had similar educational levels. Gebhard, et. al. (1965) similarly found lower educational levels among his sexual offender sample compared to controls. Only thirteen percent of heterosexual child molesters, thirteen percent of homosexual child molesters, and twenty-one percent of rapists had a grade eleven or higher education compared to twenty-one percent of other criminal offenders and fifty-two percent of the control sample. Both these studies examined incarcerated samples.

Abel (1985), on the other hand, found that among an outpatient sample of 192 child molesters, forty-six percent had at least one year of college, with a quarter of the total sample completing college or having an advanced degree. Marshall's (1985) comparison of eight-nine outpatient sex offenders with twenty-four control adults showed little difference between the mean IQ's of this group and a comparison control. A mean IQ of 92, 93, 94 and 101 was measured for heterosexual and homosexual child molesters, incest offenders, and rapists, respectively, and 91 for the control sample. It has been estimated that incarceration rates for some sex offenders are low. Onl thirteen to sixteen percent of rapists are actually incarcerated, for instance (Abel, Becker and Skinner, 1985; Dietz, 1978) making it likely that an outpatient sample of se offenders/deviants would more closely resemble the population o deviant cases than an incarcerated one. The representativenes of such an outpatient group still is uncertain, given the fac that these are individuals who, either voluntarily or by cou mandate, have sought treatment.

### 2. Measurement of Arousal.

An important aspect of evaluating sexual deviance in ter of diagnosis, treatment, and projection of future behavior h been the assessment of arousal patterns. A major weakness in t early studies on sexual deviance was that measures of arous consisted solely of self-reports. An extensive review of vari assessment procedures (Zuckerman, 1971) concluded that t measurement of penis size (penile tumescence) in response various stimuli provides the most valid indicator of sex arousal. While the development of the penile transducer provi more accurate assessments of male arousal, problems still ex with this technology. The primary problem is that it is poss for the offender to control his erectile responses (by controlling his attention and sexual fantasies. (See Quinsey and Bergersen, 1976; Laws and Holman, 1978; Abel, Becker and Skinner, 1985; Abel, Rouleau and Cunningham-Rathner, In Press). However, it has been possible to identify such faked responses under planned treatment situations and to reduce their occurrence but not to eliminate them entirely (Abel, Mittelman and Becker, 1985).

3. Ethical Considerations.

Clinical researchers are obviously unable to examine sex offenders in laboratory conditions to assess cause-and-effect relationships in the same way their social psychologist counterparts are able to do with nondeviant or "normal" populations. The risks are too great for a group with little or no control over their own behaviors. Furthermore, the notion of informed consent becomes a problem when physiological measures of arousal patterns may reveal interest patterns the patient may not even be aware of (see Abel, Rouleau and Cunningham-Rathner, In Press). Other ethical considerations further arise out of the occasional conflicting needs of the judicial system, the offender's needs and rights, therapeutic requirements, and even the public interest (see Bohmer, 1983; Abel, Rouleau and Cunningham-Rathner, In Press, for an extended discussion).

A number of important advances have been made in the last fifteen years to elucidate the nature of sexual deviancy, particularly as they relate to the measurement of arousal patterns. On the whole, however, certain inherent limitatio exist for this particular population that preclude gaining t fullest knowledge about the antecedents of their sexu behaviors. One of the earliest landmark studies based interviews with sexual offenders was conducted by the Kins Institute for Sex Research (Gebhard, et. al., 1965). The stu was notable for its scope, including 1365 sex offenders, other criminal offenders, and 477 controls, all white males. study was conducted during two time periods: 1941 to 1945 1953-1955.

Interviews with sex offenders led the authors to concl that no relation between pornography and sex crimes exists. researchers, in fact, concluded that the inferior intellige and education of the average sex offender precludes his deriv sufficient sexual arousal from pornography to lead to ov antisocial activity, a conclusion which has been contradicte much subsequent data.

Some of the other earlier studies on this question were for the 1970 Commission. On the basis of these early stu (see, for example, Cook and Fosen, 1970; Goldstein, et. 1970; Walker, 1970; Davis and Braught, 1970), the Commis concluded that (1) sex offenders did not differ from adult the general population in their reported immediate response reading or viewing erotic materials; (2) that sex offen generally had less adolescent experience with erotica than general adult population but did not differ from the latte adult exposure patterns; and (3) erotica was an insignificant factor in the reported likelihood of engaging in sexual behavior during or after exposure.

Since these early studies, much more has been learned about sex offenders in terms of their arousal patterns and efficacies of various treatment approaches.

Early exposure. Do sex offenders differ from nonoffenders in their patterns of early exposure to pornography? Goldstein, Kant, Judd, Rice and Green, (1970) found a high level of exposure to pornography during adolescence among sex offenders (categories in this study included rapists, pedophiles, transsexuals, and homosexuals) but these levels were not significantly different from a non-offender comparison group. In comparing their samples on exposure to pornography during adolescence, Goldstein and his colleagues found that more rapists than controls had never been exposed to particular types of stimuli. Yet, the differences among the various groups were not statistically significant over the total range of stimuli. Significantly less exposure was reported among rapists to photos of partially and fully nude women and to books describing nudity and oral-genital relations. In fifteen other categories (different themes in different media), the differences were not significant. In their later book elaborating on their findings (Goldstein, Kant and Harman, 1973) Goldstein and his colleagues describe a significantly larger number of rapists as having had exposure to "hard-core" pornography than controls (30% versus 2%) during childhood or between six to ten years old. They also tended to report an earlier age of "peak experience" with pornography, that is, a sexual experience that stood out in their minds the most.

Cook and Fosen (1970) found that among their sample of incarcerated sex offenders and criminal offenders, the latter reported higher rates of exposure to pornography during preadolescence and adolescence. Johnson, et. al., (1970), on the other hand, found slightly higher rates of early exposure among a sample of convicted sex offenders who were on probation and receiving therapy compared to the control sample consisting of the respondents in the Abelson, et. al. (1970) national survey (44% versus 40%).

Walker (1970) interviewed two groups of male sex offenders, one from a maximum security ward of a state hospital and the second who were prisoners in a correctional facility. Two control groups incarcerated in both facilities for reasons other than sex offenses were utilized in addition to another comparison group of male college students and members of a number of men's service clubs. The latter were more closely matched to the sex offender sample in terms of age.

Data on age of first exposure revealed no overall difference between sex offenders and the combined student and men's club controls. However, portrayals of sexual activities for which the sex offenders had earlier exposure than the men's club control group appeared to be of the more unusual variety: bestiality, group sex, and "sex activities with whips, belts or ropes."

While the student and men's club members had significantly greater exposure to a wider range of sexually explicit depictions than the sex offenders, the latter also had collected pornography for a longer period of time than the men's club members.

Another study conducted for the 1970 commission (Davis and Braught, 1970) found that early exposure to pornography was related to greater involvement in deviant sexual practices among groups of criminal offenders and a comparison group of male students. This was particularly true for what they called "serious deviance," primarily rape. The age-of-exposure variable appears to be critical as these authors found that exposure to pornography was a strong predictor of sexual deviance among the early age of exposure subjects. They also noted that "exposure to pornography in the 'early age of exposure' subgroup was related to a variety of precocious heterosexual and deviant sexual behaviors."

They found a slightly different pattern among those exposed to pornography at a later age, with the amount of exposure correlated with poor character scores and participation in criminal, deviant, and sexually active peer groups. This result suggests that among those later exposed, such exposure to pornography is part of a deviant and highly active sexual life style. Thus, two separate but related factors -- pornography and peer pressure -- seem to play some interacting role as sexual behavior patterns develop (Davis and Braught, 1973, p. 194). However, because we do not have age-of-commission data for the more deviant sexual behaviors, a hypothesis that gives a causal status to pornography exposure cannot be supported. Among 476 male reformatory inmates between sixteen to twenty-one years old, a similar association was found between early age of exposure to pornography as well as high exposure and sexual deviance.

Because more recent studies (Abel, Rouleau and Cunningham-Rather, In Press) suggest that over fifty percent of various categories of paraphiliacs had developed their deviant arousal patterns prior to age eighteen, it is clear that the age-of-first-exposure variable and the nature of that exposure needs to be examined more carefully. There is also evidence that the longer the duration of the paraphilia, the more significant the association with use of pornography (Abel, Mittelman and Becker, 1985). On the whole, the conclusion of the 1970 study that "both the extent and frequency of sex offenders' experience with erotic material is substantially less than that of non-sex (criminal) offenders and non-offender adults during preadolescence and during adolescence" needs to be qualified. These data demonstrate relatively lower levels of exposure among sex offenders when the comparison group is criminal offenders. Compared to "normal" adults, however, the differences appear to be more qualitative than quantitative: sex offenders seem to have been exposed to sexually explicit materials for the first time at earlier ages, and there are some suggestions that the range of material they were exposed to were of the more unusual variety compared to the wider range of materials that control nonoffender groups were exposed to.

It is important to stress that these findings apply specifically to incarcerated samples, particularly groups that were considered serious offenders, given the maximum security facilities housing the Goldstein, et. al. sample, the Walker sample and the Davis and Braught sample. A recent study (Carter, Prentky, Knight and Vanderveer, 1985) compared thirty-eight rapists and twenty-six child molesters incarcerated at a state treatment center. No differences were found between the groups in their exposure to pornography in the home (twenty-seven percent of the rapists and twenty-six percent of the child molesters said they had sex materials in their home while they were growing up) and during development (58% of the rapists and 54% of the child molesters had "seen or read sex materials as a teenager"). However, child molesters were found to use pornography more often than rapists in adulthood, were significantly more likely to use these materials prior to and during their offenses, and to employ pornography to relieve an impulse to commit an offense. Because of the absence of a control group of nonoffender adults, it is difficult to determine whether early exposure to pornography in this instance differs significantly from that of a nonoffender sample. The study also does not describe what types of sex materials were involved.

In retrospective interviews with eighty-nine sex offenders (all nonincarcerated and attending an outpatient clinic) and a control sample, Marshall (1985) found that greater numbers in all categories of offenders had been exposed to nonviolent pornography than the comparison group of non-offenders.

The term "pornography" in this case was limited to two categories of materials: "hard-core materials," or "those available only in specialized stores and depicting sexual acts with nothing left to the imagination" (p. 14), and materials depicting "forced sex." These were described to the subjects a those portraying "sexual relations between adult males and adul females where the female displayed a clear unwillingness t participate by both her verbal refusals and her physical attempt to prevent the attack, and the male in the depiction was said t recognize this refusal but ignored it by forcefully enacting h sexual wishes."

Marshall found that over a third of the rapists (35%), t in five homosexual child molesters (41%), a third of t heterosexual child molesters, and only a fifth of the contr adults (21%) had been exposed to materials that did not depi forced sex. Only four percent of the rapists and eight perc of the controls were exposed to sexually aggressive portray (forced sex) during pubescence. Because of the terse descript of "hard-core" sex materials used in this study, it is diffic to reconcile these findings with those of earlier ones suggest early exposure to depictions of more deviant activities.

It is apparent that these studies cover a variety comparison situations (no nonoffender controls, comparison nonsexual criminal offenders only), populations (incarcera non-incarcerated and in therapy) and a range of measures for early exposure. Certainly, the notion that sex offenders have significantly less exposure to sexually explicit materials than normal adults does not appear to hold for nonincarcerated groups (Marshall, 1985; Johnson, et. al., 1970) and, for incarcerated groups, appears to be true when the comparison group is nonsexual criminal offenders. Compared to nonoffenders, rapists differ only on specific types of material (Goldstein, et. al., 1970). Only one study (Marshall, 1985) shows somewhat higher levels of exposure than nonoffender adults.

Fantasies and Arousal.

Studies reviewed by and conducted for the 1970 Commission examined differences in arousal patterns for sex offenders and nonoffenders. These studies showed either that sex offenders were somewhat less responsive than other adults to erotic stimuli (e.g., Gebhard, P.H., J.H. Gagnon, W.B. Pomeroy and C.V. Christenson, 1965) or that both groups did not differ in their responses to reading or viewing erotic material (Cook and Fosen, 1970; Walker, 1970; Johnson, W.T., L. Kupperstein, and J. Peters, 1970). The Commission concluded in summary that "the available research indicates that sex offenders do not differ significantly from other adults in their reported arousal or reported likelihood of engaging in sexual behavior during or following exposure to erotica." (p. 284).

Later studies have demonstrated that arousal patterns among sex offenders could in fact differ from non-offenders (Abel, Barlow, Blanchard and Guild, 1977; Barbaree, Marshall and Lanthier, 1979; Quinsey, Chapin and Varney, 1981). The 1970 conclusion can be attributed to a number of factors: first, self-report measures of arousal were used for the most part. The problems with reliance on self-reports as the sole arousal measure have already been discussed. Second, many of the studies used stimuli labeled "erotica" without attempting to discriminate among content cues (stimuli used, for instance, were primaril adult heterosexual activities). Finally, with the exception o the Goldstein, et. al. (1970) study, differences among se offender categories were not examined.

Subsequent studies have shown the importance o discriminating among various categories of sex offenders, conten cues, and utilizing physiological measures of sexual arousal.

While other physiological measures have been used correlates of sexual arousal (e.g., respiration, galvanic sk response, heart rate), these have been viewed as less desirab than direct erection calibration (Zuckerman, 1971) sin increases in these variables have also been recorded for ot emotional states not related to sexual arousal.

A key study that attempted to distinguish rapists from n rapists on the basis of erections was conducted by Abel, Barl Blanchard and Guild (1977). This study was also important in attempt to discriminate responses according to consenting non-consenting stimuli. The development of a "rape index" another important element in this study. The index was quotient of the mean percent erection to rape cues to the mean percent erection to mutually consenting intercourse, a measure which was found to have predictive validity in this study and subsequent ones (see Abel, et. al., 1976; Quinsey and Chaplin, 1982; Quinsey, Chaplin and Varney, 1981; Barbaree, Marshall and Lanthier, 1979). The results showed that rapists respond to both rape and mutually enjoyable intercourse cues while nonrapists exhibited arousal only to the latter.

Other studies have similarly found that rapists show sexual arousal to rape cues as well as to depictions of consenting sexual activity compared to nonrapists who are usually more aroused to the latter (Abel, Becker, Blanchard and Djenderedjian, 1978; Barbaree, Marshall and Lanthier, 1979; Quinsey, Chaplin and Varney, 1981). The nature of sexual cues was further elaborated by Quinsey and Chaplin (1984) who found that rapists did not discriminate among the various sexually explicit narratives used while nonrapists responded most to the consenting sex narratives, less when the sexual partner did not consent, and least when the victim was shown to experience pain.

In comparing these findings to males in the general population, sexual arousal responses have also been found to be indicative of a proclivity to rape but only in combination with other factors will such a tendency be manifested in overt aggressive behavior (Malamuth, Check and Briere, 1985; Malamuth, In Press).

Child molesters also have demonstrated significantly different arousal patterns with penile circumference measur than a comparison group of non-sex offender patients (Quinse Steinman, Bergersen and Holmes, 1975). Twenty male chi molesters confined in a maximum security psychiatric instituti exhibited significantly higher penile circumference measures wh presented with slides featuring children compared to elev nonsex-offender patients from the same institution and t control adults from the community.

Marshall (1985) reported that among his sample of eigh nine sex offenders, two in five of the heterosexual chi molesters, two out of three of the homosexual child moleste and one in two rapists said they used deviant fantasies "usual or "always" during masturbation. None of the control adu indicated they had these deviant fantasies "usually" or "alwa although forty-six percent said they did so "occasionally" "rarely."

Seven out of eighteen rapists indicated that 'consen pornography' provided a cue to elicit fantasies of forced Similarly, ten of the eighteen who currently used 'consen sex' stimuli used it to elicit rape fantasies.

Abel, (1985) reported that erotica use increased s reported arousal (i.e., erotica "increased their deviant se arousal") more frequently among rapists than among c molesters, with fifty-six percent of the rapists indica erotica use increased their arousal compared to forty-two pe of the child molesters. Since there were only sixteen ra compared to 112 child molesters in this report, these findings have to be viewed with caution. In addition, a number of questions can be raised about these data. First, it is unclear what "erotica use" refers to. It could refer to usage for masturbation, for arousal prior to committing an offense, or, perhaps for child molesters, use during the commission of an offense (e.g., to lower the victim's inhibitions). It is also far from clear whether these arousal changes refer to changes in the offender's arousal patterns or whether these are simply their reported reactions to sexually explicit materials. Current evidence suggests a high correlation between deviant fantasies and deviant behaviors (Marshall, 1984; Abel, Rouleau and Cunningham-Rathner, 1985). Some treatment methods are also predicated on the link between fantasies and behavior by attempting to alter fantasy patterns in order to change the deviant behaviors (Davison, 1968; Marquis, 1970; Marshall, 1973). What is unclear, however, is the use of pornographic stimuli as a precondition for the generation of such fantasies.

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Goldstein, et. al.'s 1970 data on offenders' and a control group's reaction to a "peak experience" with erotica is reproduced below. "Peak experience" in this instance referred to the most memorable depiction of a stimulus, one "which really stood out in your mind the most" (p. 81). Again, keeping in mind that this sample was an incarcerated sample, the results show that as teenagers, deviants did not differ much from controls in terms of trying to enact the behaviors they had seen. As adults, a quarter of the female-object pedophiles did try the behavior depicted shortly thereafter compared to thirteen percent of the controls, fifteen percent of the rapists, six and seven percent of the homosexuals and transsexuals, respectively.

Table 10
Reaction to Peak Experience with Erotica
(Adapted from Goldstein, et. al., 1970)

|  | Control |  | Rapist |  | Male Object Pedo. |  | Female Object Pedo. |  | Users[a] |  |
|---|---|---|---|---|---|---|---|---|---|---|
|  | A | T | A | T | A | T | A | T | A | T |
| Wished to try | 30% | 48% | 35 | 80 | 35 | 65 | 25 | 40 | 58 | 66 |
| Did try | 13 | 28 | 15 | 30 | 15 | 25 | 25 | 20 | 22 | 30 |
| N = | 46 |  | 20 |  | 20 |  | 20 |  | 50 |  |

A User: People who were currently avid buyers and consumers of commercially available pornography.

A: Adult T: Teen

In Marshall's (1985) sample of eighty-nine sex offenders, slightly more than one third of the child molesters and rapists reported at least occasionally being incited to commit an offense by exposure to forced or consenting pornography. Pornography as an instigator was not deliberately sought out by every offender in this category to arouse them to offend. For some, pornography as an instigator was simply fortuitous. Fifty three percent of those child molesters who reported being incited to offend by pornography said their use was deliberate in their preparation for committing an offense, as was the case for thirty-three percent of the rapists. Finally, six of the eight rapists who reported being incited to offend by pornography reported occasional use of "consenting" pornography to elicit rape fantasies which in turn led to the commission of a crime. It is unclear whether the use of this type of material was by choice or because it was the only material available.

Finally, Abel, Mittelman and Becker (1985) evaluated the use of erotica/pornography by 256 paraphiliacs undergoing outpatient assessment-treatment. Regardless of paraphiliac activity, those targeting adults were somewhat more likely to use erotica (60%) than those targeting adolescents (43%) or children (46%).

Categorized according to their primary predispositioning, fifty-six percent of their rapists and forty-two percent of their child molesters implicated pornography in the commission of their offenses.

Again, these comparisons have to be viewed with caution.

The disparities in the data can, in part, be accounted for by the questions posed to the respondent and the differences in the samples. In terms of the population differences, Abel's and Marshall's samples are non-incarcerated while Goldstein's sample consisted of incarcerated sex offenders in a maximum security prison. The Goldstein sample was questioned about trying the behavior depicted in the stimulus to which the respondent had recently been exposed, a stimulus "which really stood out in your mind the most" (p. 81). This very specific question regarding the imitation of the most memorable depiction (the "peak experience") likely accounts for the lower figures relative to those obtained in the other studies. The other two studies, on the other hand, used more general questions pertaining to the use of such materials in commission of offenses.

While these figures are suggestive of the implication of pornography in the commission of sex crimes among some rapists and child molesters, the question still remains: is there a difference in the rates of offenses among those who use pornography versus those who don't? The only data available that directly address this issue suggest that these offenses occur regardless of the use of pornography by the offender (Abel, et. al., 1985).

Those offenders who did not use pornography did not differ significantly from those who did in frequency of sex crimes committed, number of victims, ability to control deviant urges, and degree of violence used during commission of the sex crime.

The longer the duration of paraphiliac arousal, however, the greater the use of pornography.

Table 11

Relationship of Erotica and Paraphilias

| Characteristic of Paraphilia | Uses erot. | Does not use erot. | Incr. arousal | Decr. arousal |
|---|---|---|---|---|
| Mean no. of sex crimes | 302.0 | 234.0 | 421.0 | 189.0 |
| Mean no. of victims | 139.0 | 200.0 | 124.0 | 153.0 |
| Sex crimes/month | 1.7 | 1.4 | 2.2 | 1.3 |
| Victims/month | 1.0 | 0.9 | 1.0 | 1.0 |
| Duration of paraphilia (mos.) | 128.0 | 86.0* | 160.0 | 99.0* |
| Ability to control behavior[a] | 81.0 | 82.0 | 75.0 | 86.0* |
| Age | 33.3 | 32.2 | 33.7 | 32.9 |
| Coercion during crime[b] | 3.2 | 3.2 | 3.2 | 3.2 |
| Social skills[c] | 3.1 | 2.6* | 3.0 | 3.2 |
| Assertive skills[c] | 2.8 | 2.7 | 2.6 | 2.9 |
|  | 3.3 | 3.0 | 3.2 | 3.3 |
|  |  | 86 | 82 | 88 |

[a] 100 = complete ability

[b] 5 = severe coercion

[c] 5 = excellent

d This analysis was conducted on the subgroup that said they "used erotica" (n = 170). The study simply described "increased arousal" in terms of an increase (or decrease) in arousal to their deviant interest.

*p ≤ .001 using t-tests.

Table reconstructed from Abel, 1985.

Based on these data, the authors suggest that sexual deviants appear to come from socially deprived environments which stunt their social and other coping skills. The longer the duration of the paraphilia, or the earlier the onset, the more likely the paraphiliac was to have used erotica. It is difficult to say, however, to what extent this early exposure contributed to the onset of the deviance.

A number of questions are not addressed in the discussion of hese data. First, it is not entirely clear what "erotica use" eans. Does it mean the offender enjoys viewing the material on regular basis? Does it mean use for arousal and masturbation? oes it mean use as incitement prior to committing an offense? or a child molester, "use" could refer also to the employment of xually explicit materials to lower inhibitions of a potential ctim and to present behaviors that might be imitated (Russell, 75). There also appear to be a few inconsistencies in the ta. For example, the number of sex crimes of those using otica (302) is considerably higher than those not using it 4), but the mean number of victims shows a difference in the osite direction (139 vs. 200). Also, the rationale for the of a criterion value of p = .001 in combination with multiple ests remains unclear.

In testimony before this Commission, Abel (1985) suggested he basis of these data that sexually explicit materials play important role in the maintenance of these paraphilias. ter numbers of deviants report current use of erotica, its use is associated with length of the deviancy, and it appears to play some role in maintaining arousal and masturbatory patterns. As Abel (1985) pointed out, while the use of pornography might decrease the likelihood for some offenders to commit sex crimes in the short run, in the long term, "the pairing or association of deviant fantasies with the pleasurable experience of orgasm perpetuates the deviant sexual interest." It is clear that the role of sexually explicit materials in this maintenance of deviancy needs to be investigated more thoroughly particularly as they relate to repeated offenses.

## Summary

While the number of studies on sex offenders has proliferated in the last fifteen years, the etiology of deviancy still remains to be answered.

There is evidence of a correlational relationship between pornography availability and rape offenses in the United States but such evidence remains in need of corroboration by experimental evidence using similar stimuli. Furthermore, correlational data appear inconsistent across cultures. There is little analogous social science evidence on pornography availability and child molestation with the exception of Kutchinsky's recent assertion that increases in availability caused less molestation in Denmark and West Germany (1985). The "causal" assertion here is not only tenuous; clinical evidence of long term use of pornography being correlated with length of the deviancy at least suggests this assertion is debatable.

The contribution of pornography to sexual deviance remains an open question. At present, "no single, comprehensive theory to explain the development of paraphiliac behavior has yet emerged." (Kilmann, et. al., 1982). Competing models include a psychoanalytic view which views the paraphilia as a symptom of an underlying psychopathology, with its origins in unresolved conflicts during psychosexual development, a Freudian view; a behavioral model which postulates that the occurrence of sexual variance is a result of classical conditioning processes including modeling, reinforcement, generalization, and punishment, much as "normal" sexual behavior also occurs; and a biological model which suggests genetic influences and emphasizes the control of sexual behavior through biological or hormonal means (e.g., Ball, 1968; Berlin, 1983; Money, 1984).

The 1970 Commission's conclusion that sex offenders have less exposure to pornography may have been applicable only to serious sex offenders (that is, those incarcerated in maximum security institutions). At most, a reevaluation of their evidence and those from subsequent studies suggest that rather than frequency of exposure, it may be the quality of that exposure and the age-of-first-exposure that might help explain subsequent sex behavior differences. Malamuth and Billings (1985) have, in fact, suggested that the effect of pornography on rapists may be more pronounced as a function of their more restrictive home environments, with limited or no information on sexuality and male-female relations.

It is unfortunate that the nature of the first masturbatory experiences and the role of pornography in that experience, if any, also remains a gap in our knowledge for future research to address.

Finally, while self-reports of some offenders appear to implicate pornography in the commission of their sex offenses, the objective data of actual offenses committed which show no significant differences between those who use pornography and those who don't have to be viewed as tentative. It is clear that in addition to investigating developmental sexual behavio patterns among offenders, their arousal patterns as these relat to offenses committed should be investigated more thoroughly.

# EFFECTS ON THE "AVERAGE INDIVIDUAL"
## THE EXPERIMENTAL EVIDENCE

In order to draw conclusions about whether exposure to pornography leads to or causes certain effects, one would have to look at the experimental evidence for these causal linkages.

The experimental results are presented in terms of effects in the areas of arousal, perceptions, affective states, attitudes, and behaviors. Two categories of pornographic stimuli have generally been used to sort out differential effects in these areas: nonaggressive-pornography and aggressive pornography (see, for example, Malamuth and Donnerstein, 1984; Donnerstein, 1983). Some question may be raised about whether in fact these two categories are sufficiently representative of distinctions the average consumer or the public at large might make or whether these two categories afford reasonable conceptual value. Nevertheless, these categories provide a convenient way to organize the results from experimental studies.

### The Effects of Violent Sexually Explicit Materials

The findings from studies investigating effects of exposure to sexually violent materials appear to be fairly unequivocal: measures in the areas of attitudes and behaviors have consistently demonstrated changes in attitudes and laboratory-measured behaviors, with the nature of the effect mediated by such additional factors as message cues (e.g., whether the female victim is shown to be abhorring or enjoying the rape) and individual personality differences.

Studies on the effects of exposure to sexually violent material have been conducted primarily in the laboratories of Neal Malamuth (at Manitoba, Canada and University of California, Los Angeles) and Edward Donnerstein at the University of Wisconsin. With their respective colleagues, they have utilized three typical approaches.

The first approach generally has subjects exposed to stimuli (usually varying consent versus force), with physiological penile tumescence and self-report measures of arousal taken during exposure, followed by questionnaires incorporating dependent variable measures (e.g., likelihood of rape, acceptance of rape myths and interpersonal violence, acceptance of sexual violence against women (see, for example, Malamuth and Check, 1980, 1981, 1983).

A second approach typified by Linz (1985) has subjects exposed to one of several types of stimuli over time (neutral aggressive, or sexually violent of the "slasher" variety) unde the guise of a film evaluation study. Prior to this exposure measures are generally obtained on psychoticism, in part t eliminate participation by subjects who might be especiall vulnerable to this type of exposure. The second phase ha subjects participate in an ostensibly different study in the l school where they are asked to take part in a mock rape tria Measures are then obtained at this point which asse punitiveness, rape empathy and similar attitudes.

The third approach has been to expose subjects in the laboratory to sexually violent versus comparison material and assess negative effects by utilizing surrogate measures of aggressive behavior (e.g., shock intensities on an aggression machine. See, for example, Donnerstein, 1980; Donnerstein and Berkowitz, 1981).

All three approaches have different virtues which contribute to our ability to understand various dimensions to the problem. For example, the physiological penile measures of arousal provide an independent and objective means of corroborating self-reports. Surrogate measures of aggression avoids the ethical problems of "inducing" actual anti-social behaviors and at the same time can be validated by actual self-reports of aggression in sexual behavior. Finally, the "massive" exposures afford a first step at our efforts to examine the longer-term effects of exposure to sexually-explicit materials.

## Effects on Fantasies

Only one study has examined the effects of sexually explicit materials on fantasies. Malamuth (1981) presented two groups of male subjects with a slide-audio show. One version depicted rape and the other showed a mutually-consenting sexual encounter. Analyses of sexual fantasies which subjects were later asked to create and write down indicated that those exposed to the rape version were more likely to create aggressive sexual fantasies.

Aggressive sexual fantasies appear to be fairly common among certain groups of offenders. Gebhard et. al. (1965) found that "patterned rapists" or those who raped repeatedly, were significantly more likely than incidental rapists to often engage in sadomasochistic fantasies (twenty percent versus zer percent). Walker and Meyer (1981) found four in five of thei rapists to report primarily deviant sexual fantasies while Abel, Becker and Skinner (1985) similarly reported aggressive sexua fantasies among their outpatient sexual assaulters. What rol pornography, particularly violent pornography, plays in th construction of these fantasies remains to be answered.

Effects on Arousal, Perceptions and Attitudes

Are there differences in effects from exposure to violen versus nonviolent sexually explicit material? An early stud (Malamuth, Reisin and Spinner, 1979) had male and female subject exposed to one of the above stimuli or a neutral one. Th materials presented were pictures from Playboy or Penthou magazines for the sexual exposures and from National Geograph for the neutral exposure. Sexually violent depictions includ pictures of rape or sadomasochism whereas the sexually nonviole material had no aggressive elements. After viewing t materials, subjects filled out a mood checklist. This w followed ten minutes later by an assessment of reactions to ra after the subjects had viewed a videotaped interview with actual rape victim as well as an assessment several days later an ostensibly different study. Both types of stimuli were fo to reduce the extent to which subjects perceived that pornogra may have detrimental effects but neither one affected reacti to rape. Correlational data, on the other hand, showed that sexual arousal to the sexually violent depictions were significantly related with a self-reported possibility of engaging in rape.

Another study (Malamuth, Haber and Feshbach, 1980) examined the effects of written descriptions of a sexual interaction based on a feature from Penthouse magazine and modified to create a violent and nonviolent version for male and female subjects. In this study, males who had been exposed to the sexually violent depiction (sadomasochism) perceived more favorably a rape depiction that was presented to subjects subsequently. Subjects were found to believe that a high percentage of men would rape if they knew they would not be punished and that many women would enjoy being victimized. Finally, of the fifty-three male subjects, seventeen percent said they personally would be likely to act as the rapist did under similar circumstances. Fifty-three percent of these males responded similarly when asked the same question if they could be assured they would not be caught.

In order to draw out the various dimensions in the portrayals of sexual violence which might explain the exhibition or inhibition of sexual responsiveness, Malamuth, Heim and Feshbach (1980) conducted two experiments on male and female students. The first experiment replicated earlier findings that normal subjects seem to be less aroused by sexual violence than by "nonviolent erotica." A second experiment manipulated reactions of the rape victim with one version showing her as experiencing an involuntary orgasm and no pain. The second version had her experiencing an orgasm with pain. Both male and female subjects were aroused to these depictions, with female subjects more aroused by the orgasm with no pain version while the males were most aroused by the orgasm with pain stimulus. The authors postulated in this case that under certain conditions, rape depictions can be arousing, particularly when the rape victim is shown experiencing an orgasm during the assault. According to the authors, subjects may have reinterpreted the events preceding the depiction of the victim's arousal so that the rape is now viewed as one that is less coercive and less guilt-inducing.

Three additional studies (Malamuth and Check, 1980a; 1980b; 1983) provide further evidence that victim reactions have a significant impact on sexual arousal and behavioral intentions. Results from one of these studies showed that both male and female subjects exhibited higher arousal levels when portrayals showed an aroused female, regardless of whether the context was a rape or a mutually consenting situation. The second study (Malamuth and Check, 1980a) similarly showed that male subjects had higher penile tumescence scores when viewing a victim-arouse rape portrayal compared to a portrayal showing victim abhorrence Significant correlations were also obtained between the reporte possibility of engaging in similar behavior, sexual arousal t rape depictions and callous attitudes toward rape.

The effect of sexually violent depictions on attitudes ha also been demonstrated with male and female subjects reporting greater acceptance of rape myths after exposure to such material (Malamuth and Check, 1980a, 1985; Malamuth, Haber and Feshbach, 1980).

In an attempt to approximate a "real world" situation, Malamuth and Check (1981) had male and female subjects view full-length features as part of campus cinema showings. The films --Swept Away and The Getaway-- represented sexually violent films whereas control subjects viewed a nonviolent feature film. Dependent measures were obtained after a week in a questionnaire presented as a separate sexual attitudes survey. These measures included rape myth acceptance measures, measures on the acceptance of interpersonal violence as well as adversarial sexual beliefs, measures developed by Burt (1980). Results showed that exposure to sexual violence increased male subjects' acceptance of interpersonal violence against women. A similar trend, though statistically nonsignificant, was found for the acceptance of rape myths. There were nonsignificant tendencies for females in the opposite direction. In addition to the advantage of external validity from this field experiment, the problem of demand characteristics in some laboratory experimental situations is quite effectively dealt with in this study.

### Aggressive Behavior

Donnerstein (1980) had male subjects provoked or treated in a neutral manner by a male or female confederate, then had them view one of three films: a sexually explicit film, a film depicting a rape, and a neutral film. Results of this study show that when the target of angered subjects was a male, there was no difference in aggressive behavior (measured by shock intensity on an aggression machine) among males in the erotic and the aggressive-pornographic conditions. However, when the target was a female, aggressive behavior was higher only in the aggressive-pornographic film condition, regardless of provocation.

To account for the impact of victim reactions in a rape portrayal, Donnerstein and Berkowitz (1981) had male subjects angered by a male or female confederate. Following instigation, they then watched one of four films: a neutral film, a non-aggressive pornographic film, an aggressive pornographic film with a positive outcome (where the woman is smiling and offering no resistance, becoming a willing participant in the end) and the last with a negative outcome, where the woman is shown exhibiting disgust and humiliation. Subjects who were angered by a male confederate were not significantly more aggressive towards the male instigator after viewing the pornographic or aggressive-pornographic film; those angered by a female, however, showed significantly higher levels of aggressive behavior in both aggressive-pornographic conditions, that is, those that portrayed a negative and those showing a positive outcome.

What about the effects of positive and negative outcomes on non-angered subjects? The same study (Donnerstein and Berkowitz, 1981) examined this issue using only female confederates. Results showed that for non-angered subjects, only the aggressive-pornographic film with a positive ending elicited higher aggression levels. Subjects exposed to this version also saw the woman portrayed as suffering less, enjoying more, and being more responsible for her situation. These findings suggest the importance of disinhibiting factors that might produce a readiness to respond (e.g., anger or frustration) and message cues (e.g., enjoyment of sexual coercion) as enhancing the likelihood of laboratory aggressive behavior. These are also short-term effects although with appropriate cues, there might be long-term effects as well. This remains speculative at this point (Malamuth and Ceniti, 1986).

A recent study demonstrates that such laboratory aggression is not always manifested when these "enhancing" factors are absent (Malamuth and Ceniti, 1986). Two groups of subjects were exposed to either sexually violent or sexually nonviolent depictions in movies, books and magazines over several weeks and compared to a third no-exposure control group. Several days later, in what was presented as a different study on ESP, measures of laboratory aggression using aversive noise were obtained in the typical aggression paradigm. No differences were found among the three exposure conditions. The authors speculated that a more immediate measure, in combination with stimuli which "prime" thoughts and feelings relevant to the exhibition of specific behaviors might be more conducive to an individual's performance of such behaviors.

An important study that clarifies the interaction of motivational, message and inhibitory factors as predictors of self-reported sexual aggression (Malamuth, In Press) has demonstrated that (a) such factors as hostility to women, dominance and acceptance of interpersonal violence, arousal to sexual violence, and sexual experience all correlate with sexually aggressive behaviors; (b) the occurrence of these aggressive behaviors is better "explained" or "predicted" by these factors in combination; (c) arousal to sexual aggression correlates with dominance and hostility to women and is also an important predictor of sexual aggression; and (d) these self-reports of sexually aggressive behavior are also correlated with laboratory measures of aggression.

Effects of Massive Exposure

In a study designed to evaluate the effects of massive exposure to sexual violence and to further explore the components of the desensitization process, a series of four studies -- all part of a Ph.D. dissertation were conducted. (Linz, 1985). College males were exposed to a series of "slasher films," all R-rated, using a formula of sexual explicitness juxtaposed with much blood and gore. A typical example is a scene from Toolbox Murders showing a naked woman taking a tub bath, masturbating, then being stalked and killed with a power drill by a masked male. Comparisons were also made among R-rated nonviolent films and X-rated nonviolent films, both of which included sexually explicit scenes (the former were of the teenage sex film ariety).[1124]

After viewing one film per day for five days, subjects were sked to participate in what was presented as a different study - a pretest of a law school documentary -- then completed a estionnaire assessing the defendant's intentions, the victim's sistance, responsibility, sympathy, attractiveness, injury and rthlessness.

Among his findings:

-- Those who were massively exposed to depictions of olence against women came to have fewer negative emotional actions to the films, to perceive them as significantly less lent, and to consider them significantly less degrading to en.

-- This desensitization appeared to spill over into a ferent context when asked to judge a female victim of a rape. se massively exposed to sexual violence judged the victim of assault to be significantly less injured and evaluated her as worthy than did the control group.

-- There were no differences between subjects exposed to the age sex film or the X-rated film and the control group on er pretrial measures on objectification of women, rape myth ptance or the acceptance of conservative sex roles or on the posttrial measures (defendant guilt, verdict, victim responsibility).

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[1124] The following films were used: R-rated nonviolent sex" films; *Porky's*, *Fast Times at Ridgemont High*, *Private* *ons*, *Last American Virgin*, and *Hots*. X-rated nonviolent ; *Debbie Does Dallas*, *Health Spa*, *The Other Side of Julie*, *ent Exposure*, and *Fantasy*. R-rated "slasher" films; *Texas* *saw Massacre*, *Maniac*, *Toolbox Murders*, *Vice Squad*, and *I* *on Your Grave*.

-- Two movies (about three hours viewing time, about twenty to twenty-five violent acts) were sufficient to obtain a desensitization effect similar to the effect obtained after exposure to five movies, suggesting that desensitization can occur fairly rapidly.

-- These findings were most pronounced for those subjects high on psychoticism and exposed to the highly sexually violent film. These individuals were significantly more likely to endorse the use of force in sexual relations and to evaluate the victim portrayed in the rape case as less credible, less worthy, and less attractive.

The effectiveness of debriefing procedures were assessed and the measures were found to be generally effective in reducing negative effects observed after film exposure.

Krafka (1985) used these same R-rated "slasher" films in a study similar to Linz's but using female subjects. Krafka also used these films as stimuli for a "violent" condition and contrasted this with exposure to sexual violence and to an X-rated set of films. The effects of massive exposure obtained for male subjects were absent for females.

It is clear that for males, exposure to sexually explicit materials juxtaposed with violence directed at a female target enhances calloused attitudes in similar situations involving women as victims.

## The Effects of Nonviolent Sexually Explicit Materials

The importance of specifying various contingent conditions under which certain effects may or may not be obtained becomes immediately obvious when one looks at the findings in this area. t is also clear that while there are a greater number of studies hat examined the effects of nonaggressive sexually explicit aterials, particularly if one includes the 1970 Commission tudies, the diversity of dependent variable measures as well as xperimental stimuli used is also greater than those in the area f sexual violence.

A number of different effects from a variety of studies have en obtained in the areas of affect, attitudes as well as havior.

### Affective and Perceptual Responses

Wishnoff (1978) exposed sexually inexperienced undergraduate ales to explicit erotic films. He found that sexual anxiety reased while expectations about engaging in intercourse in the r future increased significantly.

Along the same lines, Byrne (1977) and Byrne and Byrne 77) suggested that initially, exposure to sexually explicit erials may offend and disturb some, or produce apprehension in rs. These authors then hypothesized that frequent exposure ces negative reactions and negative appraisals of these tions. Once tolerance increases, the stimuli leads to ter pleasurable sexual fantasies and greater enjoyment, a hesis generally supported by their data.

Perceptual judgments have also been demonstrably affected by exposure, particularly in the areas of comparative judgments and estimations of reality. Kenrick and Gutierres (1980) found subjects' judgments of the attractiveness of an average female were lowered by exposure to media females. Proposing that such effects could be more significant in the realm of sexually explicit materials, Gutierres, et. al., (1985) did a follow-up recently in which subjects were asked to assess characteristics of others after exposure to slides of Playboy and Penthouse models. In four successive experiments, target persons rated were a stranger and the subject's spouse or long-term live-in partner. Both types of target persons were more negatively rated only by male subjects. Similar results were obtained after males were exposed to "beautiful females in sexually enticing activities" (sexually provocative poses or precoital and coital activities) in contrast to males exposed to less attractive females (Weaver, Masland, and Zillmann, 1984).

This perceptual contrasting of aesthetic appraisals is contingent on whether the rated target and the comparison target are associated (Melamed and Moss, 1975; Griffitt, 1971). For example, when an individual is presented in the context of attractive friends, that individual tends to be rated as more "attractive." In the case of comparing media models with a significant other, on the other hand (where presumably there is no association between the target and the comparison), the comparison stimulus, or the media model in this case, "provides an anchor or contrast point for the evaluation of the target stimulus." (Melamed and Moss, 1975, p. 129).

Hatfield and Sprecher (1983) exposed males to "a *Playboy*-type article -- a romantic seduction scene designed to be arousing." They predicted that a sexually aroused male would exaggerate a woman's sexual desirability as well as her sexual receptivity. Male subjects were then shown a photograph of "a potential date." Both predictions were confirmed. Aroused men, ccording to the authors, were more likely to agree that their otential date was "amorous," "immoral," promiscuous," "willing," unwholesome," and "uninhibited."

Different results were obtained by Dermer and Pyszczynski 1978) in an investigation of the effects of erotica on males' esponses to women they loved. They were particularly interested n whether erotica would enhance "loving" or "liking" responses. les who read an erotic story (an explicit account of sexual haviors and fantasies of a college female) reported greater mantic involvement than those in a control condition. That is, ey were more apt to report expressing "loving" than "liking" atements to their loved ones when sexually aroused than when t sexually aroused.

In looking at the above studies as a whole, it is quite ssible that with "loved ones," could accentuate perceptual dgments while stimuli that primarily enhance arousal reactions s in the Hatfield and Sprecher, 1983 and Dermer and zczynski, 1978 studies which used textual material) enhance more "love-oriented" responses for loved ones and "lust-oriented" responses in a dating situation.

Effects on Behaviors.

Initial studies conducted for the 1970 Commission showed that sexually explicit materials had either no effect on sexual behavior or when effects were observed, these were generally slight increases in those sexual activities already in the individual's established repertoire (Amoroso, et. al., 1970; Byrne and Lamberth, 1970; Kutchinsky, 1970). These behavioral effects generally occurred within a short period after exposure. However, as one of the 1970 research investigators observed, it was also possible that,

> the effects of erotica on behavior could have been obscured in the initial body of research because two major components of the influence process were missing from the early investigations: the extended time period necessary for change to occur and the specification of the depicted behavior as well as the relationship between the interactants. (Byrne and Kelley, 1984).

While more recent studies have examined the impact of nonviolent sexually explicit materials after repeated exposure, others have also examined behavioral effects after short-term exposure. It is in the latter area of behavioral effects from exposure to nonviolent sexually explicit stimuli where apparently conflicting results are found.

Baron and Bell (1977) exposed male students to stimuli that included seminude females, nudes, heterosexual intercourse and some explicit erotic passages. The mild erotic stimuli (seminudes and nudes) inhibited aggression levels whereas the "stronger" stimuli had no effects. A follow-up study (Baron, 1979), this time on female subjects, using the same stimulus materials found mild stimuli inhibiting aggressive behavior while the stronger stimuli increased aggression. Both these studies measured aggressive behavior via "shocks" delivered on an aggression machine.

In another study, photographs variously depicting "nonerotica," nude females, and couples in sexual activities were shown to male subjects (Zillmann and Sapolsky, 1977). Additionally, subjects were either provoked or unprovoked. For the latter group, no differences in aggression levels by type of stimulus were observed. No differences were observed in aggression levels for subjects who were provoked either, although respondents in this condition also exhibited lower annoyance levels. The authors explained these findings in terms of the aggression-reducing effect of relatively non-arousing but usually pleasant sexually explicit images which act to reduce annoyance or anger and consequently, aggressive behavior.

Along these lines, Sapolsky (1984) has suggested that content characteristics have an impact on affective states (that is, how pleasing or displeasing the stimulus is) as well as on arousal levels. The combination of these factors appear to produce differential responses.

Situational factors such as provocation and the removal of restraints against aggression appear to further mediate the effects of nonviolent pornography on viewers. Donnerstein,

Donnerstein and Evans (1975) found that "mild erotica" (semi-nudes and nudes from Playboy) inhibited aggressive responses in contrast to "stronger erotica" (frontal heterosexual nudes in simulated intercourse and oral-genital contact) which enhanced aggression, particularly for previously provoked subjects. A subsequent study similarly showed that a pornographic film (black and white stag film depicting oral, anal intercourse and female homosexual intercourse) increased aggression levels among angered males to a significantly greater extent than a neutral film (Donnerstein and Barrett, 1978).

In comparing the effects of both aggressive and erotic films on aggressive behavior of male subjects, Donnerstein and Hallam (1978) found both types of stimuli to increase aggressive behavior against both a male and a female target. However, when these subjects were given a second opportunity to aggress, these responses increased in the pornographic film condition for the female but not for the male target. The second aggression opportunity, the authors suggest, acts to reduce restraints on aggression against women.

In sum, the experimental effects from exposure to nonviolent pornographic material appear to be mediated by a number of conditions: the strength of the stimulus to induce arousal, the affective nature of the stimulus, and situational factors such as the removal of restraints against aggression.

Effects from Longer Term Exposure.

A number of studies, both from the 1970 Commission and more recent ones, examined the effects of "massive" exposure to pornography. "Massive exposure" in these studies means exposure over a duration of one to several weeks. Mann, Sidman and Starr (1970) exposed married couples in four consecutive weekly sessions to sexually explicit films or to nonerotic films (for the control group). Sexual activities were recorded in diaries by the subjects during the exposure period and attitudes toward pornography also assessed both prior to and after exposure. Sexual activities increased in frequency during exposure days although these activities were ones these subjects normally engaged in (i.e., they were not related to specific ones portrayed in the stimulus materials). An additional finding was that the reported stimulating effect grew weaker as the weeks progressed. Whether this diminution is attributable to boredom or to habituation is not entirely clear.

Howard, Reifler and Liptzin (1971) similarly exposed male ollege students to heavy doses of pornographic films, hotographs, and reading material during ninety-minute sessions ver a three-week period. Experimental subjects could choose rom among these materials and other "nonerotic" ones during the irst ten sessions. This was followed by three sessions where e original pornographic material was replaced by new ones. ring the last two sessions, the "nonerotic" materials were ken away. Control subjects were not exposed to these types of terials. The findings, based on physiologic and attitudinal asures, revealed initial high interest which faded rapidly with repeated exposure. After this period of unrestricted exposure, the provision of new materials failed to revive interest. Decreased penile response was measured as well as concomitant reductions in other responsiveness measures (e.g., heart rate, respiration rate and skin temperature). While the authors interpreted these results in terms of boredom, Zillmann and Braynt (1984) suggested that habituation is a potential alternative explanation based on the premise that continued exposure to emotion-inducing stimuli produces declines in the arousal component of the reaction: evidence that habituation effects might be occurring.

To test this hypothesis, Zillmann and Bryant (1984) had eighty male and female undergraduates randomly assigned to a massive, intermediate, no exposure or control group. Subjects in the three experimental groups met in six consecutive weekly session and watched six films of eight minutes duration each, with varying degrees of exposure to the explicit sex films. Ostensibly, the subjects were to evaluate the aesthetic aspects of these films. All erotic films depicted heterosexual activities, mainly fellatio, cunnilingus, coition, and anal intercourse, none of which depicted infliction of pain. The non-erotic films were educational or entertaining materials, all previously judged as interesting. Experimental subjects returned to the laboratory one week after treatment and were then exposed to three films of varying degrees of explicitness (precoitus, oral-genital sex and intercourse, and sadomasochism and bestiality) followed by measurements of excitation levels (heart rate and blood pressure) and affective ratings.

Two weeks after initial treatment, subjects were randomly assigned (within initial exposure treatments) to view one of the following: (a) a film depicting oral-genital sex and heterosexual intercourse; (b) a film depicting sadomasochistic activities; (c) a film featuring bestiality; (d) no film. Measures of aggressive behavior also were obtained at this point.

The results three weeks later indicated that with increasing exposure to various explicit stimuli, arousal responses diminished, as did aggressive behavior. Furthermore, more unusual or "harder" erotic fare appeared to grow increasingly more acceptable with subject evaluations that the material was offensive, pornographic or should be restricted progressively diminishing. Measures of sex callousness suggested further habituation effects as did projective measures of the commonality of these behaviors. According to Zillmann and Bryant, these effects were, "evident for both male and female subjects." Similar habituation effects after "massive exposure" were reported by Ceniti and Malamuth (1984) for subjects who were "force-oriented," effects which were most pronounced with exposure to sexually violent depictions. Arousal patterns were not affected, however.

An earlier report on other aspects of the same study (Zillmann and Bryant, 1982) showed that subjects also exhibited greater sex-callousness, using measures developed by Mosher

(1970). They also showed some cognitive distortion in terms of exaggerated estimates of the prevalence of various sexual activities as a result of massive exposure.

There is contrary evidence from Linz (1985) on the effects of massive exposure to nonviolent sexually explicit materials in a study described earlier under Effects of Massive Exposure to Sexual Violence. Subjects exposed to R-rated "slasher" films, "teen sex" films and "X-rated nonviolent films"[1125] did not show the same effects in a rape-judgment situation as did the "slasher" films which showed perceptual changes described as desensitization to film violence and to violence against women.

Another investigation into the effects of massive exposure to nonviolent sexually explicit materials tested the habituation hypothesis (Zillmann and Bryant, In Press) using both male and female students and adults from a metropolitan community similarly examined effects of massive exposure. This time, the "behavior" of interest was choice of entertainment material. Two weeks after exposure, subjects were provided an opportunity to watch videotapes in a private situation with G-rated, R-rated and

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[1125] Psychoticism measures included such items as the following (Linz, 1985):

(a) The idea that someone else can control your thoughts.

(b) Having thoughts about sex that bother you a lot.

(c) The idea that something is seriously wrong with your body.

(d) Never feeling close to another person.

(e) Feeling lonely when you are with other people.

-rated programs available. This opportunity to view was rovided during an ostensible "waiting period" between rocedures, with the subject's choice of entertainment and length f viewing unobtrusively recorded. Subjects with considerable rior exposure to common, nonviolent pornography showed very ittle interest in this type of fare, choosing instead to watch ore uncommon materials that included bondage, sadomasochism, and estiality. These effects, while observable among both males and emales, were again more pronounced among the former.

While habituation is certainly a plausible explanation for hese findings, choice of entertainment fare on the basis of timulus novelty cannot be precluded entirely (see Kelley, In ress). An examination of the mean amount of time spent viewing he video tapes shows that for those massively exposed, male tudents watched an average of three and a half minutes of uncommon fare" (featuring bondage, S & M, bestiality) while emale students watched an average of a minute and a half, with iewing times for their nonstudent counterparts only slightly igher. Keeping in mind that subjects had fifteen minutes of iewing time, the graduation to a preference for stronger fare, habituation, does not seem to be firmly supported by the data. rthermore, the measurement situation might also be viewed as ermission-granting," with choice of what might normally be nsidered taboo material being more permissible or socially ndoned. One could argue that greater availability of these terials in the real world might also be analogous to an indication of social sanctions being lifted, so to speak, and the laboratory evidence obtained here certainly merits more attention, perhaps through longitudinal studies.

Further measures were obtained from the same samples of subjects in the last study described above in the areas of "sexual satisfaction" and "family values." both through an extensive battery of questions (Zillmann and Bryant, 1986a, 1986b). Subjects were asked how satisfied they were with their present sexual partner, their partner's physical appearance, affectionate behavior, sexual behavior, commitment and so forth. Their findings showed significantly increased dissatisfaction in these various areas of sexuality after massive exposure.

In the area of "family values," a variety of questions tapped attitudes on pre-marital and extra-marital sex, estimations of occurrences of "sexual faithfulness" in the population, and perceptions of the institution of marriage and divorce. Again, massive exposure appears to have increased acceptance of pre-marital and extra-marital sex and diminished the importance of the institution of marriage. These findings have to be viewed with caution since the large number of statistical tests conducted increases the chances of obtaining false positive conclusions. Because of the complexity of the experimental procedures, the long battery of questions asked, and the absence of a measure validating the effectiveness of the cover story, we must also view these findings as tentative and worthy of further examination.

On the basis of the above findings, it appears that short-term effects have been observed in the laboratory but under very specific conditions. These conditions should be further elaborated on in future research. Massive exposure studies varying the lengths of exposure, on the other hand, suggest that certain types of effects may occur with long-term exposure. The question arises whether this is true of all types of sexually explicit stimuli that do not have any violent elements.

A recent Canadian study has tried to address this issue (Check, 1985). Four hundred thirty-six college students and onstudent metropolitan Toronto residents recruited by means of dvertisements, were exposed over three videotape viewing essions to one of three types of materials, or to no material at ll. The stimulus materials were constructed (primarily because o materials could be found that exclusively contained the tended manipulations) from existing commercially available tertainment videos to represent one of the following:

1. Sexual violence -- Scenes of sexual intercourse which included a woman strapped to a table and being penetrated by a large plastic penis.
2. Sexually explicit and degrading -- Scenes of sexual activity which included a man masturbating into a woman's face while sitting on top of her.
3. Sexually explicit -- Sex activities leading up to intercourse between a man and woman.

These categorizations were validated in preliminary estionnaires assessing subjects' perceptions of these erials. Results indicated that exposure to both the sexually lent and the nonviolent dehumanizing pornography (1) were more likely to be rated "obscene," "degrading," "offensive" and "aggressive;" (2) tended to elicit more pronounced feelings of anxiety, hostility and depression; and (3) tended to be successfully differentiated from the materials classified as "erotica." The patterns were less clear on reported likelihood of rape measures and reported the likelihood of engaging in coercive sex acts. While those in the violent and in the degrading exposure conditions reported significantly greater likelihood of engaging in these behaviors compared to the control group, an effect more pronounced among those with high psychoticism scores, those exposed to the "erotica" stimulus did not differ significantly from either the control or both pornography conditions. The findings also have to be viewed with caution as the exposure conditions were not completely equivalent (i.e., the no-exposure control group came in for a single session while the experimental groups came in for four sessions), a caveat Check recognized and discusses. Finally, it is not entirely clear what differential effects on the exposure groups the preliminary instructions to all subjects might have had which included some reference to the study being funded by the Fraser Commission on Pornography.

Similar findings were obtained by Senn (1985) for female subjects exposed over four sessions to slides of "erotica," "nonviolent dehumanizing pornography," and "violent pornography." The first class of materials were described as mutually pleasurable sexual expression between two individuals presented as equal in power. The second category was described as having no explicit violence but portraying acts of submission (female kneeling, male standing; female naked, male clothed) while the third included acts of explicit violence in the sexual interaction (e.g., hair pulling, whipping, rape).

Both violent and nonviolent pornography resulted in greater anxiety, depression and anger than erotica and both were also reliably differentiated from the latter on a number of affective dimensions, with "erotica" consistently rated more positively.

These findings on non-violent, "degrading" pornography are by no means definitive but they do suggest the importance of examining the effects of various content attributes.

Individual Differences.

Not everyone reacts in the same way to sexually explicit materials. Researchers have examined various individual explanatory variables which might explain more fully why individuals respond in different ways. We do not intend an exhaustive summary of the variety of individual attributes examined but merely wish to illustrate that observed effects are mediated by a number of factors. Three sets of factors will suffice for discussion.

One characteristic which has been examined is gender. It had often been asserted that females are less interested in sex than males. Some of the early studies on sexual behavior (Kinsey, Pomeroy, Martin and Gebhard, 1953) concluded that females were disinterested in pornography and were less aroused by it. The same sex differences were reported in the national survey of the 1970 Commission (Abelson, et. al., 1970).

Experimental findings, however, seem to suggest otherwise. Males and females in laboratory-exposure situations reported the same levels of arousal in response to sexually explicit stimuli (Sigusch, et. al., 1970; Byrne and Lamberth, 1971; Griffitt, 1973). Females, however, are also more apt to report negative affect toward erotic stimuli, that is, they report more shock, disgust, and annoyance than males (Schmidt, et. al., 1973). These differences, not surprisingly, are even more pronounced when aggressive sexual themes such as rape portrayals are employed (Schmidt 1974). The context of the portrayal is also significant as Stock (1983) demonstrated. Female subjects exposed to an eroticized version of a rape exhibited high arousal levels while a version which emphasized the victim's fear and pain elicited negative affective reactions and lower arousal levels. Krafka's (1985) female subjects did not exhibit the same negative effects that Linz's (1985) males did after exposure to R-rated slasher films which the former attributed to some emotional distancing because the victim in these films was invariably female.

Personality differences also mediate effects. One personality dimension which has been examined is "psychoticism" (Eysenck and Eysenck, 1976) which Barnes, Malamuth and Check, 1984a, 1984b) found to be positively related to the enjoyment of force and unconventional sexual activities. Linz (1985) and

Check (1985) similarly found psychoticism scores to be highly correlated with the acceptance of rape myths.

Finally, experiential factors also help explain response differences. Those with more previous experience with sexually explicit materials also tend to be less inclined toward restrictions (Newsweek-Gallup Survey, 1985) and also tend to exhibit more sex-calloused attitudes (Malamuth and Check, 1985) and more self-reported sexually aggressive behavior (Check, 1985).

Summary for Violent and Nonviolent Sexually Explicit Materials.

In evaluating the results for sexually violent material, it appears that exposure to such materials (1) leads to a greater acceptance of rape myths and violence against women; (2) have more pronounced effects when the victim is shown enjoying the use of force or violence; (3) is arousing for rapists and for some males in the general population; and (4) has resulted in sexual aggression against women in the laboratory.

Malamuth's (In Press) research has further demonstrated that such attitudes as rape myth acceptance and acceptance of violence against women are correlated with arousal to such materials and with "real-world" sexual aggression and that subjects who have demonstrated sexual aggression in the laboratory are also more likely to report using coercion and force in their actual sexual interactions. The validation of the measures used in his studies, the use of physiological measures of arousal, and the attempt to systematically examine patterns among different populations with a variety of measures, arousal, attitudinal and behavioral, all tend to provide the type of convergent validation we feel is required of social science evidence.

We are less confident about the findings for nonviolent sexually explicit materials and we hasten to add that this is not necessarily because this class of materials has no effects but because the wide variety of effects obtained needs to be more systematically examined and explained. We can speculate, as have others, about potential explanations regarding some of these differences. For example, Check and Malamuth (1985) have pointed to the differences between Mosher's (1970) lack of effects on sex callousness and Zillmann and Bryant's (1982) finding of greater sex callousness from exposure to nonviolent sexually explicit stimuli (using the same scale developed by Mosher) as possibly attributable to a difference in stimulus characteristics. Mosher's film, based on his own descriptions, depicted "more affection than is typical of much pornography", while Zillmann and Bryant's (1984) material tended to portray women as "nondiscriminating, as hysterically euphoric in response to just about any sexual or pseudosexual stimulation, and as eager to accommodate seemingly any and every sexual request" (p. 22). Check and Malamuth (1985) maintain that the portrayal in Zillmann and Bryant's study suggests "a dehumanized portrayal of women, which had the effect of generating disrespectful, antifemale attitudes in both male and female subjects" (p. 205).

This explanation could conceivably hold for the differences between Linz's (1985) findings and those of Zillmann and Bryants (1984). Because specific attributes that may characterize these films (other than the fact that they contain no violence) and explain their effects are either confounded (i.e., more than one factor is emphasized, making it difficult to attribute results to a particular one), or are not clearly explicated, it is more difficult to say definitively that this particular class of materials has a particular pattern of effects. There are very tentative suggestions that the manner in which the woman is portrayed in the material (i.e., whether she is portrayed in a demeaning or degrading fashion) might be an important content factor but this is clearly an area that should be investigated. Certainly, the theoretical, (and many will argue the common-sensical) reasons for mediating effects on the basis of content cues are already available from social learning theory (Bandura, 1977; Bandura, et.al., 1975).

Some Methodological Considerations

As we have done for previous sections describing different types of data collection procedures with different populations, we need to consider certain issues that pertain to experimental studies that will help clarify our evaluation of research findings. We will consider five issues in particular which are probably most often mentioned: the problem of the ability to generalize the results outside of the laboratory (what researchers call "external validity"); the problem of "the college student" as volunteer subject; the measures used to reflect "anti-social behavior"; ethical issues; and the operationalization of "pornography."

Ability to Generalize Experimental Findings.

The problem of the "artificiality" of the experimental situation is an issue not new to social psychologists (see discussions by Berkowitz and Donnerstein, 1982; Littman, 1961). While it is true that the experiment is indeed "artificial," it is so by design. If one wanted to examine if X "causes" Y, a necessary condition for establishing such a causal connection is the elimination or control of other factors which may also affect Y. Such a condition then obviates a "real-world" setting in which numerous factors interact and jointly impinge on the individual. Littman (1961) maintains that systematic experimental designs are designed to test "more universal theoretical propositions that apply to large groups of human beings." That is, they are designed to test theorized relationships about human behavior that makes the issue of representativeness of the experimental setting and subjects of lesser consequence. Berkowitz and Donnerstein, 1982, offer a cogent summary of arguments on this point. (See also Kruglanski, 1975).

The College Student as Experimental Subject.

The issue of representativeness has also been raised with regard to the college student as experimental subject, with the implication that the college student hardly represents "real people" in the "real world." To reduce the issue to one of demographics is an oversimplification. If we are interested in the question of human response to sexually explicit materials, why should being in college or being male for that matter be a problem? As Berkowitz and Donnerstein (1982) point out, "The meaning the subjects assign to the situation they are in and the behavior they are carrying out plays a greater part in determining the generalizability of an experiment's outcome than does the sample's demographic representativeness or the setting's mundane realism." (p. 249)

Having said that, we also need to point out that there are, in fact, other attributes of the subject who participates in experiments involving exposure to sexually explicit materials that might have an impact on the interpretations of experimental results. Results from various studies suggest that:

1. Males, more than females, are likely to volunteer for sex-related experiments (Kenrick, et. al., 1980).

2. Subjects who are willing to watch sexually explicit materials also tend to be sexually liberal, more sexually experienced, less anxious about sexual performance, and have fewer objections to pornography (Kaats and Davis, 1971; Farkas, et. al., 1978; Wolchick Spencer and Lisi, 1983; Wolchick, Braver and Jensen, 1985).

3. Volunteer rates drop for both men and women the more intrusive the experimental conditions. Volunteer rates dropped by two thirds (from thirty-eight percent to thirteen percent) for

women and by over half for men (from sixty-seven percent to thirty percent) with the requirement of partial undressing to accommodate physiological arousal measurements (Wolchick, Braver and Jensen, 1985).

If participants are in fact more liberal, more experienced, and more accepting of sexually explicit materials, then it is certainly plausible that the "error," if there is one, might be in the direction of null findings, while observed effects, particularly in the short term, might be indicative of their robustness (Eysenck, 1984). In any case, it is apparent that these other attributes ought to at least be considered in both the design and interpretation of experimental studies involving sexually explicit materials.

Ethical Considerations. While some bias may be inherent in the volunteer subject in general (Rosenthal and Rosnow, 1969) and in the volunteers for experiments involving sexually explicit materials in particular, we are constrained even more by understandable concerns regarding the more "vulnerable" segments of the population. Sherif's (1980) observations about the lack of evaluation procedures for the effectiveness of debriefing subjects in one particular study (see Malamuth, Heim and Feshbach, 1980 for the study in question and Malamuth, Feshbach, and Heim, 1980 for response to Sherif, 1980) have prompted researchers to measure debriefing effects (Malamuth and Check, 1984; Linz, 1985; Krafka, 1985;) and also to eliminate from participation those who might be more vulnerable to the effects of exposure to materials in these studies. For example, Linz (1985) measured potential subjects on a psychoticism scale and eliminated from participation those who had high scores on this measure. Krafka (1985) excluded from her female subject pool those who were sexually inexperienced because of earlier findings (Wishnoff, 1978) that when these types of females were exposed to explicit erotic films, their sexual anxiety diminished while their expectations about engaging in sexual intercourse increased. The trade-off between ethical concerns and representativeness is evident in Krafka's observation: "Although this restricts the population to which the present results generalize, the author was unwilling to show sexually inexperienced females degrading images of sexual behavior and, especially, pornographic rape depictions." (p. 17).

These efforts to protect subjects from potential harm are, of course, laudable and a healthy response to concerns that have been raised. In terms of the final pool of subjects who participate in pornography experiments, however, the self-selection process described above and the researcher-imposed selection process must circumscribe our evaluation of research results.

Measures of Behavioral Effects.

The range of dependent variable measures used in these tudies is reasonably diverse. The use of similar measures cross studies allows for better validation and the use of varied easures also provides the advantage of convergent validation.

We will focus on behavioral measures of effects in this discussion and briefly discuss how attitude measures may or not may predict behavior.

Four categories of behavioral measures have been used in these studies:

1. Measures of aggressive behavior. The Buss aggression machine, sometimes know as a "shock box," has been widely used in laboratory experiments in the area of media violence and aggressive behavior (see reviews by Andison, 1978; Comstock, In Press). Donnerstein and his colleagues have used this measure to examine similar effects of exposure to violent and nonviolent pornography and aggressive behavior (Donnerstein, et. al., 1975; Donnerstein and Barrett, 1978; Donnerstein, 1980; Donnerstein and Berkowitz, 1981).

The procedure usually involves putting the subject in a "learning" situation where the subject's task as "teacher" is to make sure that a "learner" (usually an experimental confederate) masters a given lesson. When the learner makes a "correct" response, the subject is instructed to reward him or her by pressing a button illuminating a light. Whenever the learner makes an error, he is punished by means of an electric shock. The sequence of responses has, of course, been preprogrammed. The subject's "aggressive tendencies" are recorded by means of the intensity and the duration of the shock which, in reality, is not received by the confederate (see Baron, 1977b for discussion on this measure).

While this procedure has been criticized (see, for example, Baron and Eggleston, 1972), subsequent procedural modifications have increased its validity and has, in fact, been found to be highly predictive of physical aggression (Baron, 1977b). The question, however, of this measure's predictive validity in the area of sexually aggressive behavior outside of the laboratory still remains open since no efforts have been directed at examining this question.

Other surrogate measures of aggressive behavior have included the infliction of aversive noise (Cantor, et. al., 1978; Malamuth, 1983) and infliction of "pain" to an experimental confederate in a retaliation move where the subject has the opportunity to apply too much cuff pressure in a blood pressure reading situation (Zillmann and Bryant, 1984). Some validation is offered by Malamuth (1983) for the use of the aversive-noise measure with evidence that attitudes about real-world aggression (such as wife battering and rape) are clearly correlated with levels of laboratory aggression against females, suggesting some linkage between laboratory aggression and external responses outside the laboratory.

2. Judgments toward sexual assailants. In numerous studies, dependent measures have been obtained by having subjects respond to a rape case by evaluating both the victim and the assailant. While perceptual measures are most often used in this instance, one could also presumably consider delivering a verdict or a sentence as "behavior." In these instances, the

presentation of a mock trial situation provides an element of mundane realism to the experimental situation. The studies by Linz (1985) and Krafka (1985) are excellent attempts at further diminishing demand characteristics of the experimental situation since the location of this phase of the experiment was conducted at the law school moot court where subjects were asked to evaluate what is purported to be the details of an actual rape case. An earlier study, a field experiment, by Malamuth and Check (1981) provides what may be the best procedure for eliminating demand characteristics and the measurement of effects in a setting that affords both control and realism. In this study, subjects were asked to watch the experimental films which were being shown on campus as part of the regular campus film program. Dependent measures were obtained a week later in what was presented as a public opinion survey. More studies in this area are clearly called for.

3. Choice and Viewing of Pornographic Fare. Zillmann and Bryant (In Press) utilized a unique way of measuring behavioral effects of exposure by examining subjects' choice of entertainment fare in an unobtrusively measured procedure. In their study of the effects of massive exposure, the following procedure was used to determine subjects' preferences for entertainment fare after they had been repeatedly exposed to pornography or to a neutral stimulus in the control condition: the subjects were met individually by the experimenter and informed of a brief delay caused by equipment problems. The

subject was then taken to another waiting area (ostensibly another student's office) with a television set, a video tape recorder, and some video tape cassettes (including general interest and adult tapes ranging from "common erotica to graphic depictions of relatively uncommon sexual practices") and invited to feel free to watch. To ensure the subject knew he could watch in privacy, the subject was told the experimenter would call him on the phone to report to the designated room. Unknown to the subject was the fact that each cassette tape was programmed to emit a unique signal such that when the tape was played, an event recorder also recorded the amount of time spent watching.

The advantage of this procedure is its experimental as well as ecological realism.

4. Self-reports of Aggressive Sexual Behavior. Two types of measures have been used to describe sexually aggressive behavior: a behavioral inclination measure operationalized by a self-reported likelihood of raping and using force in sexual interactions (see Malamuth, Haber and Feshbach, 1980; Malamuth, 1981; Briere and Malamuth, 1983) and a self-report inventory developed by Koss and Oros (1982) and used in several studies (see Malamuth, 1982; Malamuth, In Press; Check, 1985). The latter includes a range of sexual behavior measures from saying things one does not mean to obtain sexual access to using various degrees of physical force.

An instrument developed by Burt to measure attitude (1980) has been used in a number of studies (Koss, 1986; Linz, 1985;

Krafka, 1985; Malamuth and Check, 1981; Malamuth, 1981) to tap three dimensions: the acceptance of rape myths, the acceptance of interpersonal violence; and the acceptance of violence against women. The following are examples of the rape myth acceptance measure:

> When women go around braless or wearing short skirts and tight tops, they are just asking for trouble.
>
> Women who get raped while hitchhiking get what they deserve.

In evaluating these attitudinal measures and the laboratory measures of sexual behavior, two important questions have been raised to which we have alluded earlier. First, do attitudes predict behavior? And second, do laboratory measures of aggressive behavior predict actual aggressive behavior?

On the first question, Malamuth and his colleagues have demonstrated a consistent correlation between Burt's (1980) attitudinal measures and their own measures of behavioral intentions (Briere and Malamuth, 1983; Malamuth, 1981; Malamuth, Haber and Feshbach, 1980; see also Malamuth and Briere, 1986 for a discussion on the attitude-behavior question in the area of sexual aggression). Koss (1986) has similarly demonstrated a high correlation between these sex-stereotyped beliefs and self-reports of sexual aggression. We do not have these same attitudinal data from those members of the population who provide the more extreme measures of sexually aggressive behavior -- rapists -- which might provide another means of validating the attitude-behavior postulate. However, interviews of incarcerated rapists appear to show similar acceptance of rape myths (Scully and Marolla, 1984). A number of studies are also reviewed in Malamuth and Briere (1986) which support the correlation between attitudes and non-laboratory aggressive behavior.

Operationalizations of Pornography. Researchers, like lay people or the courts, have had some differences in the operationalization of "pornography." Malamuth (1984), for instance, uses the term with the qualifier that "no pejorative connotation is intended" and points out the difficulty of operationalizing the distinction between "aggressive versus positive types of pornography." (p. 29). However, he also relies on Steinem's (1980) separation of "acceptable erotica," in Malamuth's terms, emphasizing the notion of what Steinem called "shared pleasure," from "objectionable pornography," or what Steinem referred to as "sex in which there is clear force, or an unequal power" and describes stimuli in his research as using material belonging to the latter. Others have similarly used the term to refer only to sexually violent material and have used "erotica" to refer to nonviolent sexually explicit material (Abel, 1985). Still others on occasion simply use the term "erotica" and employ subclasses of aggressive and nonaggressive "erotica." (Donnerstein, 1983). Senn (1985) and Check (1985) have operationalized pornography to include both sexually violent and nonviolent but degrading categories and have classified all other sexually explicit portrayals as "erotica."

In examining the types of stimuli used in these studies

(Figure 1), it is clear that a wide diversity of research stimuli has been employed. These have ranged from partial nudity (Baron, 1979; Baron and Bell, 1977) to various levels of sexual activity, from "implied" to "explicit," covering a varied range of behaviors -- masturbation, homosexual and heterosexual intercourse, oral-genital and oral-anal intercourse, fellatio, cunnilingus, bondage, and bestiality. Sources of materials have also run the gamut from so-called stag films to mainstream sexually explicit magazines, "adult" videos from the neighborhood video store, and even sex education films (Schmidt and Sigusch, 1970; see also the earlier description of stimulus materials used in 1970 experimental studies; Check, 1985). The 1970 Commission found the term "sexually explicit materials" to have greater utility.

Comparison among studies has become hampered by the differences in stimulus materials. A common classification system has been to make use of two subclasses: violent and nonviolent pornography (see Donnerstein, 1983, 1984) and while the stimulus materials representing the former have been relatively consistent (usually a rape scene with variations on victim reactions), the same cannot be said for "violent pornography." The full range of stimuli mentioned earlier, from partial nudity to bestiality (used, for instance, by Zillmann, Bryant, Comisky and Medoff, 1981) falls within the "non-aggressive" pornography category. Perhaps not surprisingly, a full range of results (negative, no effect, and positive) have also been elicited.

Donnerstein (1983) has maintained that differential arousal levels evoke different reactions, with "mild erotica" producing a pleasant distraction and more strongly arousing material resulting in negative effects. However, this differential-arousal attribute has not been pursued in subsequent studies. Zillmann and Sapolsky (1977) have suggested that in addition to arousal, the stimulus' valence property -- how pleasing or displeasing it is -- also accounts for differential findings.

If the effects from exposure to nonaggressive sexually explicit materials are mediated in part by their affect value, a problem still remains: how do we explain the 'pleasing' or 'displeasing' character of a stimulus? Pleasing or displeasing evaluations could arise from a number of factors including the explicitness of the material, the type of activity portrayed (see, for example, Glass' (1978) scale analysis of the 1970 Commission survey data which shows clear gradations in public perceptions of different activities), or the theme employed. For example, Sherif (1980) raised the possibility of power differentials to explain female subjects' arousal but high negative affect in response to a stimulus portraying a rape victim experiencing an involuntary orgasm in Malamuth, Heim and Feshbach's (1980) study.

Two studies (Check, 1985; Senn, 1985) have attempted to reconceptualize nonaggressive sexually explicit materials into two further classes ('sexually explicit and degrading or dehumanizing', and simply 'sexually explicit'). There is theoretical justification for expecting differential effects from these subclasses. Bandura, Underwood and Fromson (1975) have demonstrated that socially reprehensible attitudes or behaviors may be made more acceptable by dehumanization of victims. "Inflicting harm on individuals who are subhuman and debased is less apt to arouse self-reproof than if they are seen as human beings with dignifying qualities." (p. 255). Again, this is clearly a line of research that merits further attention.

The problem of explicating stimulus attributes is complicated with examination of a class of materials categorized by their commercial label: "R-rated slasher films" (see Linz, Donnerstein and Penrod, 1984; Linz, 1985; Krafka, 1985), or "X-rated films." The former "contain explicit scenes of violence in which the victims are nearly always female. While the films often juxtapose a violent scene with a sensual or erotic scene (e.g., a woman masturbating in the bath is suddenly and brutally attacked), there is no indication in any of the films that the victim enjoys or is sexually aroused by violence. In nearly all cases, the scene ends in the death of the victim." (Linz, et. al., 1984, p. 137). These studies using this film genre have generally found desensitizing effects among male subjects, after massive exposure.

But the question still remains: what does this class called "R-rated slasher films" mean conceptually? If one were interested in describing potential effects from classes of sexually explicit materials, where does this set of materials fit in? This appears compounded in an examination of effects of sexually violent, violent, and sexually explicit materials on female subjects (Krafka, 1985), where these films are used to operationalize "violent" films, despite allowing that they have "some sexual content."

"X-rated films" pose the same problems. While they appear to be used to represent sexually explicit material without any violence, different themes may be emphasized leading to quite different results.

The need to utilize meaningful classes that go beyond those in current use is important not just for validity requirements. After all, the question which social scientists must ultimately address -- with both theoretical and pragmatic or public policy implications -- is what types of effects have been demonstrated for what classes of materials? Such investigations for some social scientists may have undesirable political or ideological implications but ignoring the issue also hampers our ability to explain the nature of effects more fully so as to provide for nonlegal policy strategies that are firmly anchored in social science findings (see, for example, Byrne and Kelley, 1984; Kelley, 1985).

### Some Theoretical Considerations

In designing research studies to answer particular questions, social scientists do not ordinarily operate in a vacuum. Quite often, the relationships posited, the selection of variables and their operationalizations, the groups of people selected for examination, and the general research procedures are guided by "theory." Quite simply, this is the explanatory framework which rationalizes or justifies why a particular relationship might be expected.

We think it useful to summarize some of the theoretical reasoning that has been applied to the general question of what effects if any might be found from exposure to sexually explicit stimuli.

1. Social Learning Theory. This approach offers a perspective on human behavior based on the notion that there is "a continuous reciprocal interaction" between environmental factors, an individual's processing of information from his environment and his behavior (Bandura, 1977). This framework assigns a prominent role to the processes of vicarious and symbolic learning (i.e., learning by observing others' behavior and one's own) and a self-regulating process whereby an individual selectively organizes and processes stimuli and regulate his or her behaviors accordingly.

The generic process of modeling is a major component of social learning which many mistakenly interpret as simply imitation, or a one-to-one correspondence between some portrayed novel behavior and the reproduction of such behavior. While this type of effect is not precluded (and there are certainly many anecdotal media accounts of such instances), "modeling" embraces a more complex array of processes which can be subsumed under two categories. First, modeling includes the facilitation of particular response categories ("response facilitation") which assumes that a portrayed behavior functions as an external inducement for similar sets of responses which can be performed with little difficulty. Second, it includes the capacity to strengthen or weaken inhibitions of responses ("inhibition" or "disinhibition") that may already be in the observer's repertoire. If there are restraints on a particular behavior (self-restraints, as in anxiety over a particular behavior, or external restraints, including the possibility of getting caught and punished for some socially disapproved -- or illegal -- action), such restraints may be lifted when an observer sees a model engage in disapproved acts without any adverse consequences (Bandura, 1973, 1977).

In Check and Malamuth's (1985) application of this theoretical framework, they discuss their findings in terms of Bandura's postulated "antecedent" and "consequent" determinants. The former incorporates symbolic expectancy learning principles exemplified by the symbolic pairing of sex with violence against women and vicarious expectancy learning, or observing others becoming aroused to sexual violence. Consequent determinants include observing seeing a male use force, not get punished, and, furthermore, find the experience pleasurable for himself and for his victim.

Two studies based on survey data provide additional information that certain sexually explicit materials may provide "models" for behavior for some individuals.

Russell (1985) reported findings from an earlier study on sexual abuse of women. A probability sample of 930 adult female residents in San Francisco were interviewed. Of this number, about four in ten (389 women) said they had seen pornography and forty-four percent of this group reported being upset by it. Fourteen percent of the total sample reported they had been asked to pose for pornographic pictures and ten percent said they had been upset by someone trying to get them to enact what had been seen in pornographic pictures, movies or books. An additional finding in this study was that those who were upset by pornographic requests were twice as likely to be incest victims than those who were not upset by similar requests. A similar pattern was found among those who reported being upset at being asked to pose for pornographic pictures, i.e., those who were asked to pose were more than twice as likely to suffer incest abuse in their childhood (thirty-two percent versus fourteen percent). What this suggests, according to Russell, is that women who suffered sexual abuse are significantly more vulnerable to pornography-related victimization, a "revictimization" syndrome.

Silbert and Pines (1986), in a similar study on sexual assault of street prostitutes, came upon unexpected information in the course of their interviews. From detailed descriptions the subjects provided to open-ended questions in regard to incidents of juvenile sexual assault in their childhood and to incidents of rape following entrance into prostitution, it became evident that violent pornography played a significant role in the sexual abuse of street prostitutes. Of the 200 prostitutes interviewed, 193 reported rape incidents and of this number, twenty-four percent mentioned allusions to pornographic material on the part of the rapist. Since these comments were not solicited, it is likely that this figure is a conservative estimate. The authors described the comments as following the same pattern: "the assailant referred to pornographic materials he had seen or read and then insisted that the victims not only enjoyed the rape but also the extreme violence." (p. 12).

2. Arousal. Arousal has been conceived of as a "drive" that "energizes or intensifies behavior that receives direction by independent means" (Zillmann, 1982, 1978). This model relies on the notion that arousal based on exposure to some communication stimulus can facilitate behaviors which could either be prosocial or anti-social, depending on situational circumstances. Such circumstances could include specific content cues which might elicit either positive or negative affect (Sapolsky, 1984). If arousal levels are minimal and the stimulus evokes pleasant responses (as might be the case when viewing mildly erotic material), the effect might be reduced aggression. If, on the other hand, the stimulus elevates arousal to high levels, then the outcome might be aggressive behavior. This approach has been criticized for its inability to account for the predominance of one response rather than another.

3. Habituation. The idea of habituation is akin to drug treatment or drug dependency where, over time, one must rely on increasing doses to obtain the same effect. In the area of exposure to explicit sexual stimuli, repeated exposure has resulted in initially strong arousal reactions become weaker over time, leading to habituation. (Zillmann, 1982; 1984). One attitudinal manifestation of this effect is callousness, either to victims of aggression or simply to the violent or anti-social behaviors themselves. While this holds promise as an explanatory framework, more research is needed, particularly longitudinal studies, to demonstrate its predictive utility.

4. Cue Elicitation/Disinhibition. Berkowitz (1974, 1984) has proposed a stimulus-response relational model which suggests that an individual (e.g., a film viewer) reacts impulsively to environmental stimuli and this reaction is determined in part by predispositions and in part by stimulus situational characteristics which could function to "disinhibit" such predispositions. Berkowitz has demonstrated that cues associated with aggressive responding such as a situation depicting a female victim, when viewed by an individual predisposed to aggress (one who is provoked or angered), will more likely evoke the aggressive response as a result of the stimulus-response connection already established by previous exposure to the films. (see Donnerstein and Berkowitz, 1981 and Linz, 1985 for applications).

These explanatory-predictive approaches may not necessarily operate independently; they could conceivably complement each other. They stand, however, in contrast and direct opposition to the catharsis theory which is still being promoted in many quarters as the explanation for why exposure to sexually explicit materials has only beneficial effects. Catharsis suggests that exposure to highly arousing material actually leads to a diminution of anti-social effects because relieving the arousal then reduces the instigation to commit any sex crimes in the future. Unfortunately, little evidence exists for this claim and numerous research reviews (primarily in the area of media violence and aggressive behavior) have arrived at this same conclusion (Berkowitz, 1962; Bramel, 1969; Weiss, 1969; Geen and Quanty, 1977; National Institute of Mental Health, 1982; Comstock, 1985). The following observation typifies comments made about the catharsis theory.

> The cause-effect hypothesis that we already described is not supported by the data. Little evidence for catharsis, as we have defined it, exists and much of the evidence that has been adduced in its favor is susceptible to alternative explanations that are at least parsimonious. In fact, when conditions that give rise to such alternative explanations are re-moved from the experimental setting, the reverse [authors' emphasis] of what the catharsis hypothesis predicts is usually found, i.e., aggression begets more, not less, aggression. (p. 6)

It is instructive that some have called a moratorium on catharsis (Bandura, 1973), others have proclaimed its demise (Comstock, 1985). Even its major proponent has reformulated his position by explaining why it does not apply to situations involving media exposure (Feshbach, 1980).

## Other Effects of Sexually Explicit Materials

If we take the entire potential range of "effects" which could occur as a result of exposure to sexually explicit materials, and if we take the commission of sex offenses to be one extreme of that continuum, then the other end might be represented by beneficial effects. Many have made an argument for such benefits. (Tripp, 1985; Wilson, 1978).

Public opinion data both in 1970 and in 1985 show that a majority believe use of sexually explicit materials "provide entertainment," relieve people of the impulse to commit crimes, and improve marital relations.

If they are any indication, the popularity of "How-To" articles on sex in the popular media and in best-sellers such as _The Joy of Sex_, _The Sensuous Woman_, and others like them are also testament to the learning that might occur from these materials.

There are also two areas in which sexually explicit materials have been used for positive ends: the treatment of sexual dysfunctions and the diagnosis and treatment of some paraphilias.

In the area of sexual dysfunctions, a common conceptual model views a particular goal as a new response to be learned. The reduction of sexual anxieties or the attainment of orgasm for nonorgasmic individuals might be examples of such objectives. In the process of learning a new response, two steps are implicated: the weakening of response inhibitions and facilitation of the acquisition of new behavior patterns that comprise the steps toward the final objective.

For instance, in teaching nonorgasmic females to achieve orgasm, therapeutic procedures might include desensitization techniques, followed by the modeling of a hierarchy of behaviors such as body exploration, genital manipulation, self-stimulation to orgasm, and the generalization of the response to a partner (Caird and Wincze, 1977; LoPiccolo and Lobitz, 1972; Heiman, LoPiccolo and LoPiccolo, 1976).

A number of controlled experimental studies have demonstrated the efficacy of therapeutic treatments involving video taped modeling, written instructions which implicate principles of observational learning, and information processing. Such procedures have been successful in changing both attitudes and behaviors (Anderson, 1983; Heiby and Becker, 1980; Nemetz, Craig and Reith, 1978; Wincze and Caird, 1976; Wish, 1975).

In the case of diagnosis and treatment of sex offenders, the identification of arousal patterns and the subsequent therapy program (which might involve the inhibition of inappropriate arousal responses such as arousal to a photograph of a child) have involved the use of sexually explicit materials. As part of some treatment methods, the use of aversive techniques might be directed at extinguishing deviant arousal, or they might be combined with positive reinforcement for more appropriate sexual responses. In some treatment programs, the combination of these procedures with social skills training has been found to be effective (Abel, Becker and Skinner, 1985; Whitman and Quinsey, 1981). However, the results have been less conclusive for narrower approaches to treatment (see Quinsey and Marshall, 1983).

On the whole, the learning principles that include vicarious learning, reinforcement, disinhibition principles that are used in these therapeutic controlled settings are no different from those which have been employed to explain the acquisition of negative attitudes and behaviors.

## AN INTEGRATION OF THE RESEARCH FINDINGS

It is clear that the conclusion of "no negative effects" advanced by the 1970 Commission is no longer tenable. It is also clear that catharsis, as an explanatory model for the impact of pornography, is simply unwarranted by evidence in this area, nor has catharsis fared well in the general area of mass media effects and anti-social behavior.

This is not to say, however, that the evidence as a whole is comprehensive enough or definitive enough. While we have learned much more since 1970, even more areas remain to be explored.

What do we know at this point?

-- It is clear that many sexually explicit materials, particularly of the commercial variety, that are obviously designed to be arousing, are, in fact, arousing, both to offenders and nonoffenders.

-- Rapists appear to be aroused by both forced as well as consenting sex depictions while nonoffenders (our college males) are less aroused by depictions of sexual aggression. On the other hand, when these portrayals show the victim as "enjoying" the rape, these portrayals similarly elicit high arousal levels.

-- Arousal to rape depictions appears to correlate with attitudes of acceptance of rape myths and sexual violence and both these measures likewise correlate with laboratory-observed aggressive behaviors.

-- Depictions of sexual violence also increase the likelihood that rape myths are accepted and sexual violence toward women condoned. Such attitudes have further been found to be correlated with laboratory aggression toward women. Finally, there is also some evidence that laboratory aggression toward women correlates with self-reported sexually aggressive behaviors.

What we know about the effects of nonviolent sexually explicit material is less clear. There are tentative indications that negative effects in the areas of attitudes might also occur, particularly from massive exposure. The mechanics of such effects need to be elaborated more fully, however, particularly in light of more recent findings that suggest that degrading themes might have effects that differ from non violent, non degrading sexually explicit materials. This is clearly an area that deserves further investigation.

-- There are suggestions that pornography availability may be one of a nexus of socio-cultural factors that has some bearing on rape rates in this country. Other cross-cultural data, however, offer mixed results as well so these findings have to be viewed as tentative at best.

-- We still know very little about the causes of deviancy and it is important to examine the developmental patterns of offenders, particularly patterns of early exposure. We do have some convergence on the data from some rapists and males in the general population in the areas of arousal and attitudes but again, this remains to be examined more closely.

Clearly, the need for more research remains as compelling as ever. The need for more research to also examine the efficacy of strategies for dealing with various effects is as compelling. If learning -- both prosocial and antisocial -- occurs from various depictions, and there certainly is clear evidence of both, the need for strategies that implicate the same learning principles must be evaluated. Educational and media strategies have been discussed elsewhere and found to be effective in such disparate areas as health and media violence (see Rubinstein and Brown, 1986; Johnston and Ettema, 1982; American Psychological Association, 1985). Researchers in the area of pornography have no less a responsibility.

## SUMMARY OF COMMISSION FINDINGS OF HARM FROM PORNOGRAPHY

The Commission divided pornography into four classifications and then analyzed each classification according to three tiers as set forth below:

I. Sexually Violent Materials
    A. Social Science Evidence--Negative effects were found to have been demonstrated
    B. Totality of Evidence--Harm found in all sub-tiers
        1. Acceptance of Rape Myths
        2. Degradation of the Class/Status of Women
        3. Modeling Effect
        4. Family
        5. Society
    C. Moral, Ethical and Cultural--Harm found

II. Sexual Activity Without Violence But with Degradation, Submission, Domination or Humiliation
    A. Social Science Evidence--Negative Effects were found to have been demonstrated
    B. Totality of Evidence--Harm Found in all sub-tiers
        1. Acceptance of Rape Myths
        2. Degradation of the Class/Status of Women
        3. Modeling Effect
        4. Family

5. Society

C. Moral, Ethical and Cultural--Harm found

### III. Sexual Activity Without Violence, Degradation, Submission, Domination or Humiliation

All Commissioners agreed that some materials in this classification may be harmful, some Commissioners agreed that not all materials in this classification are not harmful. It was determined that this classification is a very small percentage of the total universe of pornographic materials. See text for further discussion.

### IV. Nudity Without Force, Coercion, Sexual Activity or Degradation

All Commissioners agreed that some materials in this classification may be harmful, some Commissioners agreed that not all materials in this classification are not harmful. See text for further discussion.

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